CORRECTED COPY

No. 86-157

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND JAMES I. OWENS, ACTING COMMISSIONER OF INTERNAL REVENUE, PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES FRIED
Solicitor General

ROGER M. OLSEN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

MICHAEL L. PAUP
TERESA E. MCLAUGHLIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

99 pp

QUESTION PRESENTED

Whether the court of appeals should have ordered the district court to dismiss, on the grounds of lack of standing, a suit by various individuals and organizations for declaratory and injunctive relief requiring the government to revoke the tax exemption of the Roman Catholic Church.

PARTIES TO THE PROCEEDING

Lawrence Lader, Harold W. Bostrom, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Laurel Clinic, Inc., Milan M. Vuitch, M.D., Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproduction Health Services, Inc., Hagerstown Reproductive Health Services, Inc., Women's Health Services, Inc., Jane C. Delgado, Jennie Rose Fifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer are also plaintiffs in the district court and respondents here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	10
Conclusion	25
Appendix A	1a
Appendix B	3a
Appendix C	42a
Appendix D	46a
Appendix E	56a
Appendix F	59a
Appendix G	67a

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 ..... 7, 10, 13, 14, 16, 19
Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 ..... 21, 22
Baker v. *Carr*, 369 U.S. 186 ..... 6, 10, 14
Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 ... 21
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 ..... 22, 23
De Beers Consolidated Mines Ltd. v. *United States*, 325 U.S. 212 23
First Jersey Securities, Inc. v. *Bergen*, 605 F.2d 690, cert. denied, 444 U.S. 1074 23
Heckler v. *Chaney*, No. 83-1878 (Mar. 20, 1985) 17
Heckler v. *Mathews*, 465 U.S. 728 12
Kerr v. *United States District Court*, 426 U.S. 394 24
Laird v. *Tatum*, 408 U.S. 1 23
Lemon v. *Kurtzman*, 403 U.S. 602 20
Maryland v. *Soper*, 270 U.S. 9 24
Peru, Ex parte, 318 U.S. 578 24
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 21

Cases—Continued: Page

Schlagenhauf v. *Holder*, 379 U.S. 104 22
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 ..... 10, 12, 15
Simons, Ex parte, 247 U.S. 231 21
Surinach v. *Pesquera de Busquets*, 604 F.2d 73 20
United States Alkali Export Ass'n v. *United States*, 325 U.S. 196 23
United States as Owner of Nineteen Barges & Four Towboats, Ex parte, 263 U.S. 389 20-21
United States v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 14
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 461 ... 10, 12, 13
Walz v. *Tax Commission*, 397 U.S. 664 20
Warth v. *Seldin*, 422 U.S. 490 ..... 10, 18
Will v. *United States*, 389 U.S. 90 21
Winpisinger v. *Watson*, 628 F.2d 133, cert. denied, 446 U.S. 929 15

Constitution and statutes:

U.S. Const.:
Art. III 11, 15, 16, 21, 22
§ 2 2
Amend. I (Establishment Clause) 5
Declaratory Judgment Act, 28 U.S.C. 2201 19
Deficit Reduction Act of 1984, § 1033(a), Pub. L. No. 98-369, 98 Stat. 494 20
Internal Revenue Code (26 U.S.C.):
§ 170 3
§ 170(i) 16
§ 170(i)(4) 16
§ 501(a) 3
§ 501(c)(3) 3, 4, 8, 12, 19
§ 6103 8
§ 6104 8
§ 6201(a) 18
§ 6212 18
§ 6213 18

Constitution and statutes – Continued: Page

§ 6406 18
§ 6532 18
§ 7401 18
§ 7421 18
§ 7422 18
§ 7428 19
§ 7428(b)(1) 19
§ 7611 20
§ 7801(a) 17
§ 7805(a) 17
§§ 8001-8023 18

28 U.S.C. 1292(b) 6, 7, 20
28 U.S.C. 1346 18
28 U.S.C. 1491 18
28 U.S.C. 1651(a) 2
28 U.S.C. 2201 ..... 18, 19

Miscelleneous:

H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. (1984) 20
9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* (1985) 24
16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1977) 20

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND JAMES I. OWENS, ACTING COMMISSIONER OF INTERNAL REVENUE, PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of James A. Baker, III, Secretary of the Treasury, and James I. Owens, Acting Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a) is unreported. The July 15, 1985, opinion of the district court denying certification for interlocutory appeal (App., *infra*, 56a-58a) is unreported. The first opinion of the district court denying certification for interlocutory appeal (App., *infra*, 42a-45a) is reported at 552 F. Supp. 364. The opinions of the district court denying the motion to dismiss (App., *infra*, 46a-55a, 3a-41a) are reported at 603 F. Supp. 970 and 544 F. Supp. 471, respectively. The opinion of the district court on contempt (App., *infra*, 59a-66a) is unreported.

JURISDICTION

The order of the court of appeals denying a writ of mandamus or prohibition was entered on January 14, 1986. A petition for rehearing was denied on March 3, 1986. On May 27, 1986, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including July 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

1. Respondents, various individuals and tax-exempt organizations who support the availability of legal abortion (see App., *infra*, 4a-6a), instituted this suit against

petitioners in the United States District Court for the Southern District of New York. Respondents sought declaratory and injunctive relief requiring petitioners, the Secretary of the Treasury and the Commissioner of Internal Revenue, to revoke the tax exemption of the Roman Catholic Church on the ground that the Church's alleged lobbying activity and intervention in political campaigns in opposition to legal abortion rendered the Church ineligible for exempt status under Section 501(c)(3) of the Internal Revenue Code.[1] Section 501(c)(3) organizations are exempt from income tax and contributions made to them are generally deductible. See I.R.C. § 170.

The suit also named as defendants the United States Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB), the two principal national organizations of the Roman Catholic Church in the United States. The district court, however, ruled that the complaint failed to state a claim against the church organizations because they were entitled to rely upon tax exemptions granted by the government. Accordingly, the church organizations were dismissed as defendants. App., *infra*, 32a-33a, 40a.

---

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

Section 501(c)(3) of the Code lists as exempt from federal income taxation under Section 501(a) those entities "organized and operated exclusively for religious, charitable, * * * or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h) [which details the permissible limits of expenditures to influence legislation]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Respondents alleged that the USCC and the NCCB are lobbying, electioneering, and using tax-deductible contributions in a nationwide campaign to outlaw abortion. They further alleged that petitioners are aware that these activities exceed the limitations placed by the Code on organizations classified as tax-exempt under Section 501(c)(3), but have failed to enforce those limitations. Respondents sought declaratory relief in the form of a declaration that the political activities of the Church and the inaction of the government violated the Constitution and the Internal Revenue Code. In addition, they requested that a mandatory injunction issue against petitioners directing them to revoke the tax exemption of the USCC and the NCCB, to assess and collect all taxes thereby due, and to notify donors that contributions to the Church are not tax-deductible. App., *infra*, 9a.

2. Petitioners moved to dismiss the suit on the ground that the respondents lacked standing to sue for the relief requested. The district court denied that motion (App., *infra*, 3a-41a). It held that each of the respondents had standing to maintain the suit under one or both of two theories.

a. First, the court held that the individual respondents who were members of the clergy[2] and the church-affiliated Women's Center for Reproductive Health had "establishment clause standing" to sue (App., *infra*, 11a-18a). The court explained that these respondents had asserted "compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic Church position on abortion that are sufficient to confer standing on them to complain of the alleged establishment clause violations" (*id.* at 16a). The court stated that the religious duties of the clergy members included "counsel[ing] those

[2] Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare, and Reverend Marvin G. Lutz.

in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy" (*id.* at 16a-17a (footnote omitted)) and noted that the Women's Center "provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing" (*id.* at 17a). The court found that this "religiously inspired mission is denigrated by government endorsement of a theology contrary to its guiding principles" (*ibid.*). The court concluded that these respondents had asserted "discrete spiritual injury" because "official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message" (*ibid.*).[3]

The district court also held that all of the individual respondents and three organizations, as representatives of their individual members,[4] had "voter standing" to

---

[3] The court determined that the other plaintiffs had not articulated cognizable injury under the Establishment Clause because their concerns in this regard amounted to mere "whistleblowing" (App., *infra*, 14a). The court also ruled that the plaintiffs who sued on the basis of being members of the Roman Catholic Church had not asserted actionable injury to the practice of their faith because they had not alleged "concern for the pollution of their church by its forbidden entrance into the area of politics" (*id.* at 15a n.5). The court held that the plaintiff organizations, other than the church-affiliated Women's Center, lacked "establishment clause standing" because they had failed to demonstrate how the alleged First Amendment violations injured them (*id.* at 16a). The court also rejected the special claim of the abortion clinic plaintiffs of economic loss caused by the Church's activities, finding that the causal link between Church political activity and a decline in income of abortion clinics was too attenuated to confer standing on the clinics (*id.* at 16a n.6).

[4] These organizations are Abortion Rights Mobilization Inc., National Women's Health Network Inc., and Long Island National Organization for Women-Nassau Inc. The court held that the organizations lacked standing in their own right. App., *infra*, 18a n.9.

challenge "alleged government action which had improperly biased the political process against the discrete group to which they belong" (App., *infra,* 18a-23a). In the district court's view, the plaintiff's allegations showed that the continuation of a tax exemption for the Catholic Church distorted the electoral and legislative process by creating a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which "each dollar contributed to the church is worth more than one given to non-exempt organizations" (*id.* at 22a). Thus, the court concluded that "plaintiffs have alleged government action which has improperly biased the political process against the discrete group to which they belong" (*id.* at 21a) and therefore that the plaintiffs in question had "voter standing" under *Baker* v. *Carr*, 369 U.S. 186 (1962), to challenge the tax exemption of the Roman Catholic Church.[5] Finally, the court held that no prudential concerns were applicable that would counsel against judicial resolution of respondents' grievances (App., *infra,* 25a-28a).

3. The district court denied the government's motion to certify the case for interlocutory appeal under 28 U.S.C. 1292(b) (App., *infra*, 42a-45a). The court stated that the case did not meet the statutory requirement of "involv[ing] a controlling issue of law as to which there is substantial ground for difference of opinion" (28 U.S.C. 1292(b)), explaining that the standing question "does not concern a dispute or disagreement as to the applicable law, but instead it involves whether the court's application of the decided and governing case law to the relevant facts is appropriate" (App., *infra*, 45a).

---

[5] The court rejected the claim that the plaintiffs had standing based on alleged injury to "equal protection" rights (App., *infra,* 24a-25a).

Subsequently, this Court held in *Allen* v. *Wright*, 468 U.S. 737 (1984), that a nationwide class of black parents lacked standing to challenge the tax exemption of private schools that allegedly discriminated on the basis of race. The government renewed its motion to dismiss for lack of standing in light of *Allen*, and the district court denied the renewed motion (App., *infra*, 46a-55a). The court stated that *Allen* held merely that the denigration felt by black parents because tax exemptions were extended to schools that discriminated could not confer standing; in the court's view, this holding had no application here where the plaintiffs' contention centered on "the quasi-official imprimatur accorded the anti-abortion activities of the Church through tax exemptions and the restrictions placed on the * * * plaintiffs' political activities by § 501(c)(3)" (App., *infra*, 50a). The court also held that *Allen* did not affect its prior opinion upholding "voter standing" in this case. Finally, the court reiterated its earlier conclusion that prudential standing concerns did not preclude the plaintiffs from proceeding with this suit. Thereafter, the court again denied a motion to certify the standing question for interlocutory appeal under 28 U.S.C. 1292(b) (App., *infra*, 56a-58a).

Petitioners then petitioned the court of appeals for a writ of mandamus or prohibition directing the district court to dismiss the complaint for lack of standing. The court denied the petition in a one-sentence order that does not specify the grounds for its decision (App., *infra*, 1a-2a).

3. Respondents are currently seeking detailed discovery of information concerning the alleged lobbying and electioneering activities of the Church and its tax-exempt status (see C.A. App. 164-169, 200-201). To that end, they have requested production of documents by the petitioners[6] and also the production of voluminous

---

[6] In response to these requests for documents relating to the tax-exempt status of the NCCB and the USCC, petitoners produced those

records by the USCC and the NCCB. Among the latter documents requested to be produced are those relating to the formulation and interpretation of the bishops' position on abortion, all records relating to church officials' contacts with 1976 presidential candidates and all other candidates for public office in the United States, information regarding the financial relationships between Catholic institutions and clergy and right-to-life organizations, and all returns, records, and correspondence with the Internal Revenue Service (IRS) regarding the tax exemption.[7]

---

materials properly disclosable to the public under Section 6104 of the Code, which permits disclosure to the public of certain information regarding exempt organizations and trusts (see, *e.g.*, C.A. App. 182). Petitioners have taken the position, however, that disclosure of some of the information sought by respondents is precluded by Section 6103 of the Code, which prohibits government disclosure of tax returns and confidential return information except as specifically provided by statute (see C.A. App. 182-195).

[7] Among the specific documents sought to be produced are a document entitled "Pastoral Plan for Pro-Life Activities"; the minutes of a joint meeting of the USCC and the NCCB at which the Pastoral Plan was discussed; documents reflecting implementation of Part IV of the Pastoral Plan, which is entitled "The Pro-Life Effort in the Congressional District"; church bulletins, pastoral letters, directives, or memoranda relating to support or opposition of candidates for public office; the minutes of any meeting of the USCC or the NCCB discussing meetings with 1976 presidential candidates; documents reflecting financial support by any Catholic entity of various right-to-life groups; documents circulated within the USCC or the NCCB or to any Catholic entity concerning compliance with the restrictions on political activity contained in Section 501(c)(3) of the Internal Revenue Code; documents relating to any tax or information returns and any applications for tax-exempt status filed with the Internal Revenue Service by the USCC or the NCCB, all communications between the USCC and the NCCB and various right-to-life groups regarding Part IV of the Pastoral Plan and support or opposition of candidates for public office; all communications between the USCC and the NCCB and any announced candidate for public office; and all drafts of the foregoing (C.A. App. 162-169).

Respondents have indicated their intention to depose high-ranking church officials, including cardinals and archbishops (C.A. App. 200-201), and have also sought disclosure of the identities of bishops and directors of pro-life activities in 18 dioceses and of presidents and executive secretaries of Catholic Conferences in 18 states (C.A. App. 166).

The district court initially denied the motion of the USCC and the NCCB to quash the subpoenas, but compliance was held in abeyance while petitioners' renewed motion to dismiss was pending before the court (C.A. App. 222). On June 18, 1985, after the denial of the renewed motion to dismiss, respondents moved to hold the USCC and the NCCB in contempt for failure to comply with the subpoenas (C.A. App. 232-237), and on June 26, 1985, the USCC and the NCCB cross-moved for a protective order deferring compliance until the exhaustion of petitioner's attempts to obtain interlocutory review of the jurisdictional issues (C.A. App. 238-242). On September 5, 1985, the district court ordered enforcement of the subpoena with respect to all documents sought except for the minutes of meetings of the USCC and the NCCB, as to which respondents were ordered to narrow their request. Although the court declined to hold the USCC and the NCCB in contempt at that time, it invited plaintiffs to renew their contempt motion in the event the USCC and the NCCB failed to produce the requested documents forthwith.

On May 8, 1986, the district court granted a renewed motion by respondents to hold the USCC and the NCCB in contempt for failure to comply with those discovery orders and imposed fines totalling $100,000 per day (App., *infra*, 59a-66a). USCC and NCCB appealed, and, on May 14, 1986, the court of appeals stayed that contempt order pending appeal and set an expedited briefing schedule. The parties have completed briefing the appeal, in which petitioners and the USCC and the NCCB have

argued that the district court has no jurisdiction over the suit because the plaintiffs lack standing, and oral argument was heard on June 25, 1986. The court of appeals has not yet issued its decision.

REASONS FOR GRANTING THE PETITION

In allowing the district court to proceed to trial in this case despite its manifest lack of jurisdiction, the court of appeals has permitted the exercise of a role for the judiciary that exceeds the Article III limitations delineated by this Court in several recent decisions. There can be little doubt, in light of *Allen* v. *Wright*, 468 U.S. 737 (1984), *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), that respondents lack standing to pursue this suit to compel petitioners to revoke the tax exemption of the Roman Catholic Church. Thus, the continuation of this lawsuit, involving burdensome discovery that will intrude deeply into the internal procedures of the agency charged with administering the tax laws and the internal activities of one of the Nation's major religious groups and inevitably will produce serious challenges to the confidentiality of information provided to federal tax authorities, sharply conflicts with constitutional principles well established by this Court and threatens to interject the judiciary into an arena reserved for the Executive Branch.

1. It is well established that in order to have standing to maintain a lawsuit a plaintiff must " 'allege[] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (*Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The standing requirement has both con-

stitutional and prudential aspects. The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" (*Allen* v. *Wright,* 468 U.S. at 751). In addition to these constitutional requirements, this Court has also recognized that prudential considerations must inform the determination whether a plaintiff is entitled to invoke the jurisdiction of a federal court to adjudicate a grievance. These considerations include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Ibid.*

On several occasions in recent years, the Court has reaffirmed these basic standing principles and emphasized that they ordinarily deny access to the federal courts to plaintiffs who seek to litigate the claim that the government is failing to enforce its laws—in particular, laws relating to tax exemptions—against a third party. Most recently, in *Allen* v. *Wright, supra,* the Court held that the parents of black public school children lacked standing to challenge the tax-exempt status of allegedly discriminatory private schools. Their first claim was that, because the grant of a tax exemption constituted an indirect subsidy for the discriminatory schools, they were directly harmed by the failure of the government to revoke those exemptions (468 U.S. at 752). The Court held that such a claim of injury was not judicially cognizable because " '[a]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning' " (468 U.S. at 754

(quoting *Valley Forge,* 454 U.S. at 483)). To the extent that the alleged injury was a "stigmatic injury, or denigration, suffered by all members of a racial group when the Goverment discriminates on the basis of race" (468 U.S. at 754 (footnote omitted)), the Court held that "such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct" (468 U.S. at 755, quoting *Heckler* v. *Mathews,* 465 U.S. 728, 740 (1984)). The Court also rejected the plaintiffs' claim that they had standing because the government's administration of the tax laws "diminished [their children's] ability to receive an education in a racially integrated school" (468 U.S. at 756). The Court explained that the line of causation between the government's enforcement of the tax laws and the desegregation of plaintiffs' schools was far too weak; it was sheer speculation whether the withdrawal of tax exemptions would have any effect on school desegregation (*id.* at 758).

In *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* this Court also found no standing to litigate whether the government was properly enforcing the tax laws against other persons. A group of indigent plaintiffs had sued Treasury officials to challenge a Revenue Ruling that allowed nonprofit hospitals to qualify for tax exemption under Section 501(c)(3) even if they provided only emergency room services to the indigent. This Court held that the plaintiffs' allegations of injury in the form of the denial of services by these hospitals did not confer standing because it was "purely speculative" whether the alleged injury could fairly be traced to the government's tax enforcement action "or instead result[s] from decisions made by the hospitals without regard to the tax implications" (426 U.S. at 42-43). And in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc., supra,* the Court held that the plaintiffs lacked standing to challenge the conveyance of surplus federal prop-

erty to sectarian institutions because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" (454 U.S. at 485 (emphasis in original)). These decisions demonstrate that the plaintiffs in the instant case lack standing to challenge the tax exemption of the Catholic Church.

a. The district court's ruling that the individual clergy members and the church-affiliated Women's Center for Reproductive Health have "establishment clause standing" cannot be squared with this Court's precedent. The district court itself acknowledged that most of the individual plaintiffs, despite their special interest in pro-abortion views and candidates, suffered no personalized injury from the government's alleged favorable treatment of the Catholic Church. There is no basis for the court's seemingly contradictory conclusion that the clergy plaintiffs nevertheless had suffered such injury. Their alleged injury was a "denigration" (App., *infra,* 16a, 17a) stemming from the perceived favoritism toward another religion that has views on abortion diametrically opposed to those of the clergy plaintiffs. It is clear from *Allen* that this type of stigmatic injury cannot confer standing. See 468 U.S. at 754-755. The fact that clergymen may be more sensitive to this perceived favoritism for another religion is irrelevant; standing "is not measured by the intensity of the litigant's interest or the fervor of his advocacy" (*Valley Forge,* 454 U.S. at 486).

The clergy plaintiffs here have not alleged that they have "suffered as a direct result of having personally been denied equal treatment" (*Allen* v. *Wright,* 468 U.S. at 755). Like the plaintiffs in *Valley Forge,* the clergy plaintiffs fail "to identify any personal injury suffered by them

as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" (454 U.S. at 485 (emphasis in original)). Plainly, their ability to minister to their congregations and to preach to them that their religion "command[s] consideration of abortion as the morally required response to pregnancy" (App., *infra,* 16a-17a) is not adversely affected by the challenged government conduct and would not be enhanced at all if the plaintiffs were to receive the relief that they seek. In short, the clergy plaintiffs, like the other respondents, simply seek to obtain "consistent enforcement of the tax laws" (*id.* at 50a). As the Court stated in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders' " (468 U.S. at 756, quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 687 (1973)).

b. The district court's holding that the respondents have "voter standing" is equally unsupportable. In the words of the district court, the nature of the injury suffered by respondents was as follows (App., *infra,* 22a):

> Plaintiffs claim that allegedly unconstitutional government conduct and illegal private conduct have distorted the electoral and legislative process by creating a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations.

As the district court acknowledged (*id.* at 21a), it is clear that respondents' complaint has nothing whatsoever to do with diminished representation or voting; hence, there is no basis for "voter standing," and reliance on *Baker* v. *Carr, supra,* is wholly misplaced. Rather, the court found

that there was a "distortion" of the political process inherent in the availability of a tax exemption for donations made to the Church, but not for donations made to politically active abortion rights groups (App., *infra*, 22a). This notion of "candidate" or "campaign contributor" standing is unavailing because, even under this theory, respondents cannot demonstrate a direct personal injury caused by the alleged government misconduct. See *Winpisinger* v. *Watson*, 628 F.2d 133, 139 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980) (Kennedy supporters lacked standing to raise claim that their candidate had been harmed by the incumbent administration's allegedly illegal expenditure of government funds to benefit the renomination of President Carter).

Even if one assumes that the injury asserted—a "distortion" of the political process—is sufficiently distinct and palpable to satisfy Article III, the injury can confer standing only if it "fairly can be traced to the challenged action of the defendant, and not * * * [to] the independent action of some third party not before the court" (*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 41-42). Examination of the chain of causation here clearly indicates that the link between the challenged government action and the respondents' supposed disadvantaged status in the abortion controversy is too uncertain to support standing. As was the case in *Eastern Kentucky* (see 426 U.S. at 42-43), it is purely speculative whether contributors to the Roman Catholic Church base their decisions to give in any significant way upon the tax implications of their contributions. Charitable contributions, after all, derive from a variety of motives, which may or may not include tax planning. Further, any tax benefit involved comes, for the most part, in the form of an itemized deduction, making it a matter of little moment

to the vast number of taxpayers who do not itemize their deductions.[8] The improvement of respondents' position in the abortion controversy depends upon the independent actions of numerous third persons not before the district court. Thus, the injury alleged by the plaintiffs is neither fairly traceable to the challenged government action nor likely to be redressed by the relief they seek (see *Allen*, 468 U.S. at 758).

Accordingly, respondents do not have a sufficient stake in the subject of the proper enforcement of the tax laws against the Roman Catholic Church to meet the Article III "cases" or "controversies" requirements. They lack Article III standing, and hence the district court would exceed the constitutional limitations on its jurisdiction if it proceeds to try this case.

c. Quite apart from the fact that respondents' suit fails to meet the constitutional prerequisites for federal court jurisdiction, it is manifest that respondents lack standing under the prudential limitations on standing that have been identified by this Court. As in *Allen* v. *Wright, supra*, respondents seek to compel the Executive Branch to undertake a nationwide review of the activities of a tax-exempt organization to determine whether it continues to qualify for exemption. But suits challenging an Executive agency's enforcement program, even when "premised on allegations of instances of violations of law," are "rarely if ever appropriate for federal-court adjudication" (468 U.S. at 759-760). And the Court has recently emphasized that a

---

[8] Although Section 170(i) of the Code provides a limited deduction for charitable contributions by taxpayers who do not itemize their deductions, that provision is scheduled to expire at the end of 1986 (Section 170(i) (4) of the Code).

suit to compel an agency to undertake a specific enforcement inquiry is particularly unsuitable for judicial resolution:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler v. Chaney, No. 83-1878 (Mar. 20, 1985), slip op. 10. This case starkly illustrates the magnitude of the potential intrusion into executive functions that the district court has endorsed. The Catholic Church consists of tens of thousands of individual entities—parishes, dioceses, schools, hospitals, etc.—that for administrative purposes fall under the "umbrella" exemption given to the USCC. The plaintiffs here seek to compel a massive, nationwide inquiry under the aegis of the district court into the IRS's decisions with regard to the tax-exempt status of a multitude of entities.

The administration of the tax laws presents a particularly strong case for refusal by the courts to hear such claims because Congress has established a detailed mechanism concerning tax enforcement by the Executive. Section 7801(a) of the Code provides that "the administration and enforcement" of the tax laws is vested exclusively in the Secretary of the Treasury, and Section 7805(a) of the Code grants the Secretary authority to "prescribe all needful rules and regulations" attendant to that task. In addition,

the Secretary is authorized and required "to make the inquiries, determinations, and assessments of all taxes" (I.R.C. § 6201(a)), and his findings of fact and decisions on the merits in allowing refund claims are not reviewable by any other administrative or accounting officer of the United States, absent fraud or an arithmetical mistake (I.R.C. § 6406). Moreover, no civil action by the government for the recovery of taxes can be commenced "unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced" (I.R.C. § 7401). Finally, Congress has reserved to itself the task of overseeing the enforcement of the internal revenue laws by creating a Joint Committee on Taxation to investigate the administration, operations and effects of the tax system (I.R.C. §§ 8001-8023).

Congress has also limited judicial review of tax matters by establishing a comprehensive statutory scheme providing specific avenues for adjudication of tax disputes, specifically barring strike suits that would attempt to interfere with the orderly administration of the tax code (see I.R.C. § 7421 and 28 U.S.C. 2201). That carefully crafted scheme of limited judicial review plainly reveals that the fundamental question of prudential standing—"whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief" (*Warth* v. *Seldin*, 422 U.S. at 500)—must be answered in the negative. Congress has authorized taxpayers to bring deficiency actions in the Tax Court to obtain review of asserted deficiencies in income, gift and estate taxes without first having to pay the amount in dispute (I.R.C. §§ 6212, 6213). Alternatively, Congress has permitted a taxpayer to file a suit for refund of his taxes in a federal district court or in the Claims Court (I.R.C. §§ 6532, 7422; 28 U.S.C. 1346, 1491). Finally, although Congress has generally barred declaratory relief in actions "with

respect to federal taxes" under the Declaratory Judgment Act, 28 U.S.C. 2201, it has permitted an organization which is the subject of a determination by the Secretary regarding its initial or continuing qualification for tax-exempt status to seek a declaratory judgment regarding its classification in the Claims Court, the Tax Court or the District Court for the District of Columbia (I.R.C. § 7428). Significantly, Congress has explicitly restricted the availability of that relief to that organization alone (I.R.C. § 7428(b)(1)). Thus, it is clear that Congress viewed the invoking of judicial examination of the validity of a particular organization's tax exemption as the prerogative, and the business, only of the government and of the organization in question, not of third parties.

It is therefore apparent that all of the prudential criteria identified in *Allen* v. *Wright, supra,* counsel against district court jurisdiction of respondents' suit to resolve the question of the Church's continuing qualification for its tax exemption. The plaintiffs are seeking to vindicate not their own legal rights, but rather the government's right to collect taxes from an organization that allegedly is not eligible for a tax exemption; the plaintiffs' concern about tax law enforcement is "more appropriately addressed in the representative branches," *i.e.,* through the congressional oversight procedures established by law; and the plaintiffs' complaint does not "fall within the zone of interests protected" by Section 501(c)(3). See 468 U.S. at 751. In sum, it is manifest that the district court lacks jurisdiction over this lawsuit and that the controlling issue of respondents' lack of standing would not be illuminated by further proceedings in the district court; that court's decision to proceed to trial therefore should not have been permitted to stand.[9]

---

[9] It is highly pertinent that the executive function asserted by respondents to have been neglected here necessarily involves the sensitive task of separating church activities relating to the exercise of

2. Because the district court declined to certify the standing issue for interlocutory appeal under 28 U.S.C. 1292(b), the issue was presented to the court of appeals in the context of a petition for mandamus or prohibition.[10] The issuance of such a writ is an extraordinary remedy,

---

religious beliefs from impermissible lobbying and intervention in political campaigns (cf. *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979)). As this Court observed in *Lemon* v. *Kurtzman*, 403 U.S. 602, 620 (1971), "[t]his kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." To be sure, the test is inescapably one of degree, in that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion" (*Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970)). However, the possibilities for excessive government entanglement with religion inherent in the inquiry that respondents seek to compel and the concomitant potential interference with the free exercise of religious beliefs militate against judicial review of restraint exercised by the Executive in performing that duty. Moreover, the difficulties attending church tax audits have recently prompted Congress to enact detailed remedial legislation (see Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 494; H.R. Conf. Rep. No. 98-861, 98th Cong., 2d Sess. 1101 *et seq.* (1984)). Pursuant to this legislation, Section 7611 of the Code, effective with respect to inquiries and examinations beginning after 1984 of any organization claiming to be a church, restricts the permissible scope of inquiry and triggers stringent procedural safeguards in the conduct of inquiries and examinations. These restrictions are directed at government investigation of religious activity, rather than that conducted by private parties, and by their terms would not appear to apply to a lawsuit like this one. Thus, entertainment of suits like this one by the federal courts would have the anomalous effect of granting respondents greater license to investigate the Church's continuing qualification for tax exemption than the agency charged by Congress with the enforcement of the tax laws.

[10] There is little practical difference between the two writs of mandamus and prohibition. See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3932, at 206-207 (1977). Like mandamus, its more familiar counterpart, the writ of prohibition "is directed against unwarranted assumptions of jurisdiction or excesses of it." *Ex parte United States, as Owner of Nineteen Barges and*

and this Court has stated that it is to be invoked only in exceptional circumstances amounting to a judicial usurpation of power. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Will* v. *United States*, 389 U.S. 90, 95 (1967). A writ of mandamus should not issue unless the petitioner has no other adequate means of obtaining the desired relief, and he must show that his entitlement to relief is clear and undisputable. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Issuance of a writ of mandamus is appropriate, however, " 'to confine an inferior court to the lawful exercise of its prescribed jurisdiction.' " *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. at 35 (citation omitted); *Will* v. *United States*, 389 U.S. at 95; *Roche* v. *Evaporated Milk Ass'n, supra.* Here, unless a higher court intervenes, the district court intends to proceed to trial in a case in which it manifestly lacks Article III jurisdiction. Because of both the extreme consequences that the district court's decision will have in this case and the degree to which that decision flies in the face of established Supreme Court precedent, this is an extraordinary case that warrants the issuance of an extraordinary writ.

The district court's determination to proceed with the suit, notwithstanding this Court's governing precedents, exceeds its jurisdiction as prescribed by Article III and

---

Four Towboats, 263 U.S. 389, 393 (1923). In this case, the label to be affixed to the writ depends upon whether the appropriate relief is viewed as prohibiting the district court from proceeding to hear this case or, alternatively, ordering the district court to dismiss the case. In either event, issuance of the writ requires consideration of the same factors, and the precise label attached to the writ does not matter. See *Ex parte Simons*, 247 U.S. 231, 239-240 (1918). For convenience, we will use the term "mandamus" to refer to mandamus or prohibition.

amounts to a judicial usurpation of power that must be halted. The court of appeals should have issued a writ of mandamus to arrest this usurpation of power at an early stage of the case. The standards that govern Article III standing are firm and well established; this is not a case where the district court's decision can be said to concern a matter within its discretion. Cf. *Allied Chemical Corp.* v. *Daiflon, Inc.* 449 U.S. at 36. Nor can it be said that additional discovery or litigation will shed any further light on the standing question; even if all the allegations of the plaintiffs are assumed to be true, it is clear that there is no standing. The government's right to relief is "clear and indisputable" (see *ibid.*). Accordingly, given the exceptional nature of this case, the issuance of a writ of mandamus was warranted here, and it is appropriate for this Court to grant certiorari to overturn the court of appeals' failure to issue the writ. See *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959).

The extraordinary nature of this case is apparent from the face of the complaint; a group of citizens, whose views on a controversial issue of public concern are diametrically opposed to the moral and religious views of the Roman Catholic Church, are suing to compel the government to revoke the tax exemption of the Church and to assess back taxes against it because of the activities that the Church allegedly has undertaken in connection with that issue. The exceptional nature of the case is compounded by the intrusive nature of the litigation that is contemplated. The discovery that is already underway (see pages 7-9 & nn. 6 & 7, *supra*) and the trial that will follow will involve a nationwide review of both government enforcement practices and the internal religious, social, and financial affairs of the Catholic Church at all levels. This inquiry, if it is permitted to continue through discovery and trial, threatens

irreparable harm to the interests of both the government and the Church. It may intrude into confidential tax information collected by the government and will surely embroil the district court in constitutional controversy with respect to efforts to obtain internal Church documents and to depose clergymen at all hierarchical levels.[11] In these circumstances, it is plain that irreparable harm will ensue if the underlying suit is not dismissed before trial even though any relief obtained by the plaintiffs would still be subject to appeal from a final judgment. This Court has recognized that the availability of such an appeal does not always render mandamus inappropriate, and the harm that would result here from discovery and trial strongly indicates that the writ should issue. See *Beacon Theatres, Inc.* v. *Westover, supra; De Beers Consolidated Mines Ltd.* v. *United States,* 325 U.S. 212 (1945); *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196 (1945); see also *First Jersey Securities, Inc.* v. *Bergen,* 605 F.2d 690, 701-702 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

Finally, it is apparent that considerations of judicial economy strongly counsel in favor of issuance of the writ. The policy against piecemeal litigation, which this Court has identified as one of the primary reasons for the strict

---

[11] The prospect of discovery and trial here, on the basis of the abstract injuries alleged by respondents, evokes the scenario rejected by this Court in *Laird* v. *Tatum*, 408 U.S. 1, 14 (1972):

> Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission.

Here, the investigation would probe not only into the government's own enforcement activities but necessarily would also probe deeply into the inner workings of the Church.

criteria governing mandamus (see *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976)), obviously plays no role here. The defect in the district court is jurisdictional; issuance of a writ of mandamus ordering the district court to dismiss the case will definitively end the case, thereby eliminating time-consuming and potentially troublesome discovery and trial. The resolution of this question of the trial court's jurisdiction presents the classic case for resort to an extraordinary writ. See, *e.g., Ex parte Peru,* 318 U.S. 578, 586-587 (1943); *Maryland* v. *Soper,* 270 U.S. 9, 29-30 (1926). The government has made every effort to have this threshold issue resolved without the need to resort to an extraordinary writ; it has—unsuccessfully—twice asked the district court to dismiss the case and to certify it for interlocutory appeal. In the face of the court's refusal to avail itself of these options, the issuance of a writ of mandamus is called for. See 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.22[5], at 267 (1985). Failure to issue the writ will result in an unwarranted interference by third parties in sensitive matters intended by Congress to be subject to judicial intervention only to the limited extent required to resolve disputes that may arise between the government and particular taxpayers concerning their own tax liability.[12]

---

[12] Moreover, permitting the present case to proceed to trial would encourage similar suits by third parties dissatisfied with the tax treatment of other groups with whose views they disagree. Even if such suits would ultimately fail on the merits, they could be used for purposes of securing information through discovery for utilization in public debate.

CONCLUSION

The petition for a writ of certiorari should be granted.[13]
Respectfully submitted.

CHARLES FRIED
Solicitor General

ROGER M. OLSEN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

MICHAEL L. PAUP
TERESA E. MCLAUGHLIN
Attorneys

JULY 1986

[13] The standing issue may soon be decided by the court of appeals on USCC and NCCB's appeal from the contempt citation (see pages 9-10, *supra*), which is being heard on an expedited basis. In these circumstances, the Court may deem it appropriate to hold this petition pending the court of appeals' decision in that case for consideration together with any petition for certiorari that may be filed seeking review of that decision.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

85-3056

IN RE: JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, PETITIONERS,

ABORTION RIGHTS MOBILIZATION, INC., LAWRENCE LADER; HAROLD W. BOSTROM; MARGARET O'STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMEN'S HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, LAUREN CLINIC, INC., MILAN M. VUITCH, M.D., WOMEN'S CENTER FOR REPRODUCTIVE HEALTH, THE FEDERATION OF FEMINIST WOMEN'S HEALTH CENTERS, INC., HARRISBURG REPRODUCTIVE HEALTH SERVICES, INC., HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, INC., WOMEN'S HEALTH SERVICES, INC., JANE C. DELGADO, JENNIE ROSE FIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW, AND SUSAN SHERER, RESPONDENTS,

v.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, PETITIONERS.

A petition for writ of mandamus and/or prohibition having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED

Dated: January 14, 1986

/s/ RICHARD J. CARDAMONE

/s/ GEORGE C. PRATT

/s/ CHARLES E. WYZANSKI, JR.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5990 (RLC).

ABORTION RIGHTS MOBILIZATION, INC., LAWRENCE LADER, HAROLD W. BOSTROM, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMEN'S HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, LAUREN CLINIC, INC., MILAN M. VUITCH, M.D., WOMEN'S CENTER FOR REPRODUCTIVE HEALTH, THE FEDERATION OF FEMINIST WOMEN'S HEALTH CENTERS, INC., HARRISBURG REPRODUCTIVE HEALTH SERVICES, INC., HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, INC., WOMEN'S HEALTH SERVICES, INC., JANE C. DELGADO, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW, AND SUSAN SHERER, PLAINTIFFS,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, UNITED STATES CATHOLIC CONFERENCE, INCORPORATED, AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS, DEFENDANTS.

July 19, 1982

OPINION

ROBERT L. CARTER, District Judge.

This is an action challenging the constitutionality of the government's enforcement of § 501(c)(3) of the Internal

Revenue Code ("Code"), 26 U.S.C. § 501(c)(3) (1976). Plaintiffs are 29 individuals and organizations concerned about the right of a woman to choose to carry a fetus to term or to abort it and about the constitutionally mandated separation of church and state. The complaint names four defendants: two government officers ("government" or "federal defendants"), Donald T. Regan, the Secretary of the Treasury, and Roscoe L. Egger, Jr., the Commissioner of Internal Revenue, and the two principal national organizations of the Roman Catholic Church in the United States ("church defendants"), the United States Catholic Conference, Incorporated ("USCC"), and the National Conference of Catholic Bishops ("NCCB").

Defendants move to dismiss the action. They assert that none of the plaintiffs has the requisite standing to bring the suit, that the complaint does not state a claim upon which to grant relief, and that the court may not review the particular decisions to enforce or not to enforce § 501(c)(3) that are in dispute. In addition, the church defendants contend that they are not proper parties to this suit and that § 501(c)(3) is unconstitutional. For the reasons discussed herein, the motions to dismiss are granted in part and denied in part.

I

A. *The Plaintiffs*

The complaint names nine organizations and twenty individuals as plaintiffs. Each plaintiff (except Judith Seibel) has submitted an affidavit to augment the complaint's description of that plaintiff's particular concerns and injuries. The plaintiffs are described briefly here; their particular grievances are discussed in greater detail *infra*.

Abortion Rights Mobilization, Inc. ("ARM") is a nonprofit, tax exempt organization under § 501(c)(3) that seeks to secure and implement a woman's right to a legal

abortion. It is a national organization and is prohibited from engaging in political activity under the terms of its tax exemption. Contributions to ARM are tax-deductible.

Lawrence Lader is a writer, and founder and president of ARM. He has been active in the abortion rights movement and has written a number of books on the subject.

Harold W. Bostrom, Margaret O. Strahl, M.D., Helen W. Edey, M.D., and Ruth P. Smith all contribute to ARM, other abortion rights organizations and pro-choice political candidates.

National Women's Health Network, Inc. ("NWHN") is a tax-exempt membership organization of many clinics, counseling services, publishers and others who provide a wide range of services to women and attempt to influence the public to support women's rights, including the right to have an abortion. Contributions to NWHN are tax-deductible, but the organization is prohibited under § 501(c)(3) from engaging in electoral politics.

Long Island National Organization For Women ("Nassau-NOW") is a membership organization dedicated to the promotion of women's rights, including the right to have an abortion. Nassau-NOW is exempt from taxes under § 501(c)(4) of the Internal Revenue Code.

Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare and Reverend Marvin G. Lutz ("clergy plaintiffs") are members of the clergy whose religious beliefs differ significantly from the Catholic Church's view of abortions. These clergy members have been active in the abortion rights movement but have not used the power of their pulpits to engage in political activities.

Laurel Clinic, Inc., Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc. and Women's Health Services, Inc. are clinics that offer to women a range of medical and other services, including

abortions. The Federation of Feminist Women's Health Centers, Inc., Women's Health Services Inc. and the Women's Center for Reproductive Health are exempt from taxes under § 501(c)(3).

Milan M. Vuitch, M.D., is president of the Laurel Clinic, Inc.

Jane C. Delgado, Jennie Ross Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski and Judith A. Seibel are Roman Catholics who, in keeping with their religious beliefs, contribute or have contributed to the church but who nonetheless are opposed to the church's position on abortion.

Karen DeCrow is a leader of the feminist movement and a former national president of the National Organization for Women. She was a candidate for political office in 1969 and is a potential candidate in the future.

Susan Sherer is active in the abortion rights movement.

All the individual plaintiffs are taxpayers and voters. Each of them in his or her affidavit expresses a substantial concern for the separation of church and state that is required by the establishment clause of the first amendment. Finally, plaintiff Brickner, as a private citizen, is chairman of the national issues committee of the New York State Liberal Party.

B. *The Statutory Scheme*

Section 501(c)(3) of the Code exempts from taxation groups "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . ., and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 501(c)(3) (1976). Organizations exempt from income taxation under this section in effect receive a double benefit because § 170(a), (c)(2)(B) of the

Code permits an income, gift or estate tax deduction for contributions to most § 501(c)3) entities. *See* 26 U.S.C. § 170 (1976). Section 501(c)(3) status, thus, is valuable to an organization because the organization can provide donors with an economic incentive to contribute to it and the organization is not taxed on the income received. Organizations exempt from taxation under other portions of § 501, by contrast, often are not entitled to receive tax-deductible contributions. *See* 26 U.S.C. §§ 170, 501 (1976).

To maintain the dual benefit of tax exemption and deductible contributions, a § 501(c)(3) entity must refrain from any kind of campaigning for candidates for public office. 26 U.S.C. § 170(a), (c)(2)(D) (1976); *id.* § 501(c)(3). These groups, however, are allowed to lobby as long as their attempts to influence legislation do not constitute a "substantial part" of their activities. 26 U.S.C. § 501(c)(3) (1976).

C. The Dispute

The Internal Revenue Service ("IRS"), annually since March 25, 1946, has ruled that "the agencies and instrumentalities and all educational, charitable, and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory . . . are entitled to exemption from Federal income tax under . . . section 501(c)(3). . . ." Exh. A to church defendants' Motion to Dismiss (Letter from T. Kern, District Director, IRS to USCC, June 16, 1980). Defendant USCC is the recipient of the Revenue Ruling letter that certifies the church's exemption status.

Plaintiffs contend that this grant of § 501(c)(3) privileges was erroneously and illegally conferred because the church defendants are engaged in a nationwide plan to change abortion laws by, *inter alia,* lobbying and participating in partisan political campaigns on behalf of can-

didates supporting the Roman Catholic Church's position on abortion and in opposition to candidates with contrary views. Amended Complaint ¶¶ 21-28; *cf. McRae v. Califano*, 491 F.Supp. 630, 703-28 (E.D.N.Y.), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (describing some of the church's electoral and legislative activities pursuant to its "Pastoral Plan" to outlaw abortion). Despite this violation of the Code, plaintiffs allege, the government defendants have declined to apply the § 501(c)(3) prohibition against electioneering or lobbying to the church defendants and their subsidiaries. By contrast, no organization with different views on the abortion controversy has been granted tax-exempt status under 501(c)(3) while being permitted to participate in electoral politics.

Plaintiffs contend that this illegal activity has injured them in several ways. The individual plaintiffs and the members of certain of the institutional plaintiffs have been denied access to a means of contributing tax-deductible funds to promote free choice candidates. Persons with opposing views about abortion, on the other hand, can use the church to funnel donations to support candidates opposed to abortion and thereby receive a tax benefit. Those plaintiffs who have stood for office or aspire to do so on a pro-choice platform have no means of collecting tax-deductible and exempt funds for their campaign chests. Their opponents may do so. The government defendants, it is alleged, have diminished the effectiveness of plaintiffs' political speech and their chances to prevail at the polls by enhancing the voice of plaintiffs' political adversaries.

Plaintiffs also express concern about the entanglement of church and state through the selective grant of an unrestricted tax exemption to the church defendants. The government defendants' actions are viewed by plaintiffs as selecting a favored state orthodoxy, thereby breaching the wall between church and state and denigrating religious

beliefs out of government favor. In addition, plaintiffs who are religiously compelled to consider abortion as the correct response to pregnancy or who, as ministers, must counsel their congregants to do the same, express the fear that government financial support, through the Code, of the Roman Catholic Church's position on abortion will imperil the opportunity of women to obtain abortions and thereby frustrate their ability to observe their religious beliefs. Plaintiffs who are members of and contributors to the Roman Catholic Church object to their church's political use of the religiously compelled contributions.

The organizational plaintiffs complain that the government defendants have treated them differently from the church for no rational reason. In addition, those plaintiffs offering medical services to women, including abortion, assert that as a result of the church defendants' government subsidized political canpaigning, restrictive abortion legislation has been enacted that has caused a decrease in plaintiffs' revenues.

Plaintiffs seek a declaration from the court that the political activities of the Roman Catholic Church and the inaction by the Secretary and the Commissioner violate the Constitution and the Code. In addition, plaintiffs request an order requiring the government defendants to take all actions necessary to enforce the Constitution and the Code, including revocation of the church defendants' § 501(c)(3) status, collection of all taxes due, and notification to church contributors that they may not deduct such contributions.

Jurisdiction is founded on 28 U.S.C. §§ 1331, 1340, 1361.

II

Defendants challenge plaintiffs' standing to bring an action concerning the tax status of third parties. Plaintiffs

respond by asserting three bases for their right to proceed: establishment clause standing, voter standing, and equal protection standing.[1]

A. Article III Requirements

The Supreme Court recently has had occasion to examine and clarify the rules for standing in federal courts.

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 72 [98 S.Ct. 2620, 2629, 57 L.Ed.2d 595] (1978), quoting *Baker v. Carr,* 369 U.S. 186, 204 [82 S.Ct. 691, 703, 7 L.Ed.2d 663] (1962). This requirement of a "personal stake" must consist of "a 'distinct and palpable injury . . .' to the plaintiff," *Duke Power Co.,* 438 U.S. at 72 [98 S.Ct. at 2629], quoting *Warth v. Seldin,* 442 U.S. 490, 501 [95 S.Ct 2197, 2206, 45 L.Ed.2d 343] (1975), and 'a fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co.,* 438 U.S. at 72, [98 S.Ct. at 2629], quoting *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 261 [97 S.Ct. 555, 561, 50 L.Ed.2d 450] (1977).

Larson v. Valente, ____ U.S. ____, ____, 102 S.Ct. 1673, 1680, 72 L.Ed.2d 33 (1982). In addition to demonstrating

---

[1] Plaintiffs have withdrawn a fourth theory of standing based upon their status as taxpayers. Taxpayer standing is a narrow grant to challenge Congressional action under the taxing and spending power of Art. I, § 8 of the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* ____

an injury that the challenged action caused, plaintiffs must show "that the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co. v. Carolina Env. Study Groups, supra,* 438 U.S. at 74, 98 S.Ct. at 2630; *accord, Larson v. Valente, supra* 102 S.Ct. at 1682 n. 15; *Simon v. E. Ky. Welfare Rights Organization,* 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Court's statements indicate that a three step inquiry should be observed in determining Article III standing: injury in fact must be ascertained, a causal link between the injury and the putatively illegal conduct must be identified, and the court must be able to provide a remedy.[2]

1. *Establishment Clause Standing.* The existence of Article III injury "often turns on the nature and source of the claim asserted." *Warth v. Seldin, supra,* 442 U.S. at 500, 95 S.Ct. at 2205. The injury in fact requirement can be satisfied by a wide range of harms, including economic, aesthetic, environmental, or spiritual damage. *See, e.g., Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 111-12, 99 S.Ct. 1601, 1613-1614, 60 L.Ed.2d 66 (1979) (denial of right to interracial association); *Duke Power*

U.S. ____, ____, 102 S.Ct. 752, 762-63, 70 L.Ed.2d 700 (1982) [hereinafter cited as *Valley Forge*]; *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U.S. 208, 228, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974); *United States v. Richardson,* 418 U.S. 166, 174-75, 94 S.Ct. 2940, 2945-2946, 41 L.Ed.2d 678 (1974).

For purposes of ruling on the standing question, the court must accept as true all material allegations in the complaint, construe the complaint in favor of the plaintiffs and similarly consider supporting affidavits. *E.g. Warth v. Seldin,* 442 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

[2] Although some opinions have described the test as a two pronged one, the second "prong" seemingly contains two discrete, albeit closely related, elements: causation and redressability. For purposes of clarity, the test therefore shall be considered to analyze three separate factors.

Co. v. Carolina Env. Study Group, supra, 438 U.S. at 73-74, 98 S.Ct. at 2629-2630 (environmental and aesthetic consequences of pollution); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973) (enjoyment of natural resources); *School Dist. of Abington Township, Pa. v. Schempp,* 374 U.S. 203, 208-210, 212, 83 S.Ct. 1560, 1563-1564, 1565, 10 L.Ed.2d 844 (1963) (spiritual values). There is no invariant meaning to the term "palpable injury"; the Constitution or a statute can create an interest that exists only in the legal regime, and damage to such an interest may fulfill the injury in fact requirement. *See Valley Forge, supra,* 102 S.Ct. at 769 (1982) (Brennan, J., dissenting); *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 152, 71 S.Ct. 624, 638, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

Although the Supreme Court has recognized that violation of a person's "spiritual stake in the First Amendment values" of separation of church and state may inflict sufficient harm to satisfy the injury in fact test, *see Data Processing Service Organization v. Camp,* 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970), *citing School Dist. of Abington Township, Pa. v. Schempp, supra,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, it has cautioned that offense to one's sense of fidelity to separatist principles is an insufficient injury to bring suit for an alleged establishment clause violation. *See Valley Forge, supra,* 102 S.Ct. at 764-66; *Doremus v. Bd. of Education,* 342 U.S. 429, 431, 433-34, 72 S.Ct. 394, 396, 396-97, 96 L.Ed. 475 (1952). Would be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed." *School Dist. of Abington Township, Pa. v. Schempp, supra,* 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9.

In *Valley Forge,* the Supreme Court overturned a decision granting standing to an organization suing on behalf of its members who professed injury to their shared individuated right to non-establishment when surplus federal property was transferred to a denominational college.[3] *See* 102 S.Ct. at 764-66. Crucial to the Supreme Court's decision was the complete lack of connection between the plaintiff and the property. Neither plaintiff nor its members alleged any physical contact with the college or its environs, and plaintiff and its members did not claim that they may have been entitled to the property if it had not been given to the college. Although the transfer affronted plaintiff's members' sense of command of the establishment clause, they could not identify any more definite and personalized connection with the objectionable transaction. *See id.* at 766. In the absence of some interest in the property, plaintiff or its members suffered no injury from the transfer.

Similarly in *Doremus v. Bd. of Education,* the Court dismissed for lack of standing the complaint of taxpayers contending that a New Jersey statute requiring Bible reading at the opening of the school day violated the establishment clause. *See* 342 U.S. at 430, 72 S.Ct. at 395. Plaintiffs did not allege any personal, religiously inspired interest or activity that the Bible reading interfered with nor did they have any personal contact with the recitations, either through attendance or through children in attendance. *See id.* at 431, 72 S.Ct. at 396.

Underlying the rejection of plaintiffs' standing in *Valley Forge* and *Doremus* is the principle that the interest of each citizen that the government be administered according to law does not confer standing because it does not

---

[3] Although the *Valley Forge* plaintiffs asserted principally a claim of taxpayer standing, the Supreme Court opinion discussed at length the standards for establishment clause standing. *See* 102 S.Ct. at 763-67. This discussion was in direct response to the basis for finding standing that the Court of Appeals had articulated. *See id.* at 763-64.

create in that citizen a discrete and palpable injury. *Valley Forge, supra,* 102 S.Ct. at 764; *see Schlesinger v. Reservists Comm. to Stop the War, supra,* 418 U.S. at 216-22, 94 S.Ct. at 2929-2932 (1974). Plaintiffs asserting establishment claims, as any other plaintiffs, have "no special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge, supra,* 102 S.Ct. at 766 (footnote omitted).[4]

The individual plaintiffs' concern about the establishment clause violations perpetrated by the defendants does not rise above the whistleblowing that the Supreme Court held, in *Valley Forge,* does not satisfy the injury requirement. Plaintiffs attempt to articulate injury in fact by linking the offending activity with their involvement in the abortion rights controversy, They describe the government action of which they complain as a subsidy to opponents of abortion that impacts on plaintiffs' particularized interest to preserve reproductive choice. Plaintiffs argue, in effect, that because they object to an establishment violation occurring in a particular arena of public controversy in which they are involved, they have suffered a discrete and palpable injury not experienced by the *Valley Forge* plaintiff. Plaintiffs' characterization of their injury shares

---

[4] The crucial standing defect in the claim of a citizen alleging governmental misconduct and nothing more is not that the alleged misconduct does not inflict harm on someone, but that the wrongdoing does not injure the plaintiff personally. Such allegations may be sufficient to make out a claim that someone has been injured; they fail to confer standing because they do not satisfy the Article III requirement that the plaintiff be among those who have suffered the injury. *See Warth v. Seldin, supra,* 422 U.S. at 502, 95 S.Ct. at 2207; *Fed'n for Am. Immigration Reform v. Klutznick,* 486 F.Supp. 564, 568 & n.7 (D.D.C.) (three judge court), *appeal dismissed,* 447 U.S. 916, 100 S.Ct. 3005, 65 L.Ed.2d 1109 (1980).

This standing defect should not be confused with the prudential reason for declining to hear a case that presents a generalized grievance that is better resolved by the executive or the legislature even though the plaintiff has suffered an injury in fact and has satisfied the other Article III standing requirements. *See* p. 484 *infra.*

the defect that caused the demise of the *Valley Forge* complaint. In both cases, plaintiffs described an interest that brought them to court, but they did not articulate an injury that they had suffered. Plaintiffs' devotion to the pro-choice position does not identify an interest that the allegedly illegal activities have damaged; it only explains why plaintiffs have chosen to complain about a particular government impropriety—renewal of the church defendants' § 501(c)(3) status—and not about some other wrongdoing. Plaintiffs' "special interest" in reproductive freedom is no different than the *Valley Forge* plaintiff's "special interest" in strict separation. The narrowness of the focus of litigant's concerns is not of constitutional significance as far as standing is concerned. There is no indication in the *Valley Forge* opinion that the plaintiff there would have met the injury in fact test if it single-mindedly pursued its anti-establishment goals in the field of public education only, rather than its objections to government support for any religious body or activity. *See id.* 102 S.Ct. at 765 ("standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").[5]

---

[5] Several Roman Catholic laity assert claims of injury that could be distinguishable from the claims of the public generally. These plaintiffs object to the federal defendants' standing aside while the church violates § 501(c)(3) by using funds contributed to it, including donations from the plaintiffs, to electioneer for anti-abortion candidates. Such claims might be construed to plead injury to the plaintiffs' church from non-enforcement of the Code. The establishment clause was designed not only to protect civil society from undue pressures from spiritual communities within it, but also to protect the sacred life of the population from the taint of secular politics. *See Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 39-40, 53-54, 67 S.Ct. 504, 522-523, 529-530, 91 L.Ed. 711 (1947) (Rutledge, J., dissenting); Memorial and Remonstrance Against Religious Assessments ¶¶ 6-8, *reprinted in id.* at 67-68, 67 S.Ct. at 536-537.

In their affidavits, however, these plaintiffs do not express concern for the pollution of their church by its forbidden entrance into the area of politics. Their expressed claims are limited to injuries to their "rights to live in a society that believes in freedom of religion." *E.g.* Delgado affidavit ¶ 5; Walsh affidavit ¶ 5. This is a generalized harm

The organizational plaintiffs also fail to set out the injury in fact to themselves or their members that is necessary to confer standing under the establishment clause. They merely allege concern about the first amendment violations arising from the church's political activity while it enjoys § 501(c)(3) status. As did the individual plaintiffs, the organizations have explained why they are moved to bring suit to end these violations; they have not, however, explained how the violations injure them.[6]

The clergy plaintiffs and the Women's Center for Reproductive Health ("Women's Center") have disclosed, in their affidavits, compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic Church position on abortion that are sufficient to confer standing on them to complain of the alleged establishment clause violations. The clergy plaintiffs have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties, they must counsel those in their care in accordance with religious laws that command con-

---

experienced as a citizen, not as a church member, and is a harm that is indistinguishable from the injury inflicted upon all citizens by executive disregard for the law. Because these plaintiffs have not complained of a distinct and palpable injury inflicted upon them as practicing Roman Catholics, they have no standing under the establishment clause.

[6] The groups providing medical services to women arguably occupy a different position from the other institutional plaintiffs because they allege threatened or actual economic loss from the defendants' illegal activities. This injury, however, will not confer standing because the causal link between the church's tax status and these plaintiffs' lost revenues is tenuous at best. It is doubtful that the marginal increase in the coffers of the foes of abortion that is attributable to the church's tax exemption is a significant factor in legislation that has reduced the income of abortion clinics.

sideration of abortion as the morally required response to pregnancy.[7] The Women's Center provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing. It was founded by Reverend Lutz along with others to put the principles of the Presbyterian Church into effect. As with the clergy plaintiffs, the Women's Center's religiously inspired mission is denigrated by government endorsement of a theology contrary to its guiding principles.

Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because of official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message. The spiritual values protected by the establishment clause can be injured without direct coercion against individuals, *see Engel v. Vitale,* 370 U.S. 421, 430-31, 82 S.Ct. 1261, 1266-1267, 8 L.Ed.2d 601 (1962) (indirect coercive pressure to conform to officially approved doctrine), even if plaintiffs have not alleged that particular religious freedoms have been infringed, *School Dist. of Abington*

---

[7] The clergy plaintiffs have identified in their affidavits their respective denominations' attitudes towards pregnancy and abortion. These affidavits state that certain theologies consider compelling a woman to carry a fetus to term as repugnant as other theologies, such as the contemporary Roman Catholic Church doctrine, find abortion, *see* Affidavit of Rabbi Israel Margolies ¶ 3 ("To force a woman to bring an unwanted fetus into the world is a serious abridgement of the Bible . . ."), and that the availability of safe abortions may be necessary to permit a women to fulfill her religious obligations, *see* Affidavit of Rev. Beatrice Blair ¶¶ 5-6 ("part of Episcopalian doctrine that women and families should be free to terminate [certain] pregnancies."); *cf. McRae v. Califano, supra,* 491 F.Supp. at 696-702 (discussing pro-choice theological doctrines).

Township, Pa. v. Schempp, supra, 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9 (1963). It is sufficient to establish injury in fact that plaintiffs can show, as the clergy plaintiffs have, that the challenged action adversely affects them in their daily lives. *See id.*

These plaintiffs also clearly satisfy the second and third aspects of the Article III standing test—causation and redressability. Their injury flows directly from the federal defendants' allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury. Accordingly, the clergy plaintiffs and the Women's Center meet the Article III requirements for standing to raise claims under the establishment clause.

2. *Voter standing.* In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court conferred "voter standing" on a group of Tennessee citizens challenging the state's apportionment scheme as "effecting a gross disproportion of representation to voting populations." *Id.* at 207, 82, S.Ct. at 704. The plaintiffs asserted that the classification disfavored the voters in some counties by "placing them in a position of unjustifiable inequality *vis-a-vis*" voters in other counties. *Id.* These allegations stated sufficient injury to satisfy the Article III standing requirements.

Baker's voter standing analysis was applied in three cases that strongly support a finding that the individual plaintiffs[8] and certain of the organizational plaintiffs[9]

---

[8] Plaintiffs Lader, Bostrom, Strahl, Edey, Smith, Margolies, Blair, Brickner, Hare, Lutz, Vuitch, Delgado, Lifrieri, Walsh, Luciano, Michalski, Niebrzydowski, Seibel, DeCrow, and Sherer.

[9] None of the organizational plaintiffs can allege injury to themselves as organizations in the context of voter standing. *See*

have asserted a distinct, personal injury that confers standing. Two of the cases, like the instant action, involved challenges to the enforcement of the tax laws. All three are highly instructive.

Tax Analysts and Advocates v. Schultz, 376 F.Supp. 889 (D.D.C.1974), involved a challenge to an IRS revenue ruling stating that gifts of up to $3,000 to multiple finance committees organized to receive campaign contributions for the same candidate were to be treated as gifts to the committee and not to the candidate. Plaintiffs, a non-profit corporation promoting tax reform and one of its members, alleged that the revenue ruling was illegal because it permitted individuals to donate unlimited sums and to escape gift taxes by donating $3,000 increments to

---

Simon v. *E. Ky. Welfare Rights Organization, supra,* 426 U.S. at 39-40, 96 S.Ct. at 1924-1925 (1976); *Fed'n for Am. Immigration Reform v. Klutznick, supra,* 486 F.Supp. at 569. Organizations can establish standing, however, "as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. *Warth v. Seldin, supra,* 442 U.S., at 511 [95 S.Ct., at 2211]." *Simon v. E. Ky. Welfare Rights Organization, supra,* 426 U.S. at 40, 96 S.Ct. at 1925; *see Common Cause v. Democratic Nat'l Comm.,* 333 F.Supp. 803, 809 & n.11 (D.D.C.1971). National Women's Health Network, Inc., ARM and Nassau-NOW are devoted to promoting women's rights, including the right to a legal abortion. Given the political orientation of this organizational purpose, these entities have powerful claims to represent voter-members "uniquely, or even predominantly, injured" by the challenged government conduct. *Ripon Society v. Nat'l Republican Party,* 525 F.2d 567, 573 (D.C.Cir.1975), *cert. denied,* 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). In any event, the organizational plaintiffs' standing will depend upon their members' satisfaction of the requirements of voter's standing, and the groups' participation in the case cannot "lessen the controversy, or blur the presentation of issues . . . in any way." *Id.* at 574.

The other organizational plaintiffs nowhere allege that they or their members engage in any political activity or that they are involved in affecting the legislative process in any substantial manner. In the absence of such allegations, these organizations have no standing to represent their members' interests under the voter standing doctrine.

separate committees which served only to funnel the money to central committees for the particular candidate. *Id.* at 891. Focusing on the corporate plaintiff's membership in applying the standing tests, the court noted that the named member was "a taxpaying citizen, voter and small contributor to election campaigns." *Id.* at 898, As such, plaintiff asserted that the challenged ruling substantially diminished "his ability to affect the electoral process and to pursuade elected officials to adopt policies and programs he favors" by increasing the influence of a favored class of large contributors. *Id.* Applying constitutional standing doctrine to these circumstances, the court held that alleged diminution of one's vote and dilution of the ability to affect the electoral process "are judicially recognized wrongs and are thus sufficient allegations of actual injury." *Id.* at 899

Two Illinois voters, one a political candidate, the other a supporter, had standing to challenge the patronage system in Cook County because of the alleged injury to their interest "in an equal chance and an equal voice" in the election process. *Shakman v. Democratic Organization of Cook County,* 435 F.2d 267, 269-70 (7th Cir. 1970), *cert. denied,* 402 U.S. 909, 91 S.Ct. 1383, 28 L.Ed.2d 650 (1971). Since that interest is protected by the federal constitution, impairment thereof gives standing to the victims of the challenged practices. *Id.* at 269; *see Shakman v. Democratic Organization of Cook County,* 481 F.Supp. 1315, 1328 (N.D. Ill.1979) (granting summary judgment to plaintiffs).

Finally, in *Common Cause v. Democratic National Comm., supra,* a non-profit public interest corporation, its chairman (a voter) and two elected politicians sought declaratory and injunctive relief against several national committees of political parties. Plaintiffs alleged that those groups circumvented the statute placing limits on individual campaign contributions. 333 F.Supp. at 806. The government's failure to prosecute these alleged violations

resulted in the dilution of plaintiffs' participation in the voting process. *Id.* at 808. The court could find no "serious impediment to the plaintiffs' standing." *Id.*

Grounded in the equal protection safeguards of the fifth, rather than the fourteenth, amendment, plaintiffs' claims seem barely distinguishable from those involved in *Baker.* Both cases center on allegations that some arbitrary government action diluted the strength of voters in one group at the expense of those in another. Plaintiffs' injury is no less real because they claim discrimination based on issues rather than geography, nor is it relevant that the impact of allegedly harmful government conduct is felt during the battle over choosing representatives rather than in the number of representatives technically available to the aggrieved voters. The bottom line is that plaintiffs have alleged government action which has improperly biased the political process against the discrete group to which they belong.

Defendants contend that *Shakman, Shultz* and *Common Cause* incorrectly applied the concept of voter standing as set forth in *Baker v. Carr. Baker,* it is said, requires a showing of mathematical dilution of voting strength as a prerequisite of voter standing. Such precision supposedly is necessary to establish concrete personal injury.

The rationale of *Baker's* standing analysis cannot be so restricted. *Baker,* the three subsequent decisions and the case at bar all concern allegations that some arbitrary government action impaired one group's ability to affect the political process in preference to a more favored group. The injury to oppressed voters is as distinct and palpable here as in any of the previous cases.

The precision with which an injury can be defined is irrelevant to the concreteness of the injury, but that factor may affect considerations of causation or redressability. Defendants contend that the imprecise allegations of harm in the complaint mask its inadequate showing that defendants' actions have caused the harms plaintiffs allege or that an alteration or threatened alteration of the church de-

fendants' tax status will ameliorate plaintiffs' injuries. Defendants' arguments, however, mischaracterize the complaint as objecting to the church's political activity *per se* and seeking relief in the form of a legislatively guaranteed right to abortion.

Plaintiffs have asserted a more circumscribed grievance and request. They do not demand a discontinuation of the church's political activity, nor do they seek, through the court, to prevent the election of antiabortion candidates. Plaintiffs claim that allegedly unconstitutional government conduct and illegal private conduct have distorted the electoral and legislative process by creating a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations. Plaintiffs do not complain of diminished representation and do not demand increases in actual representation. They complain of arbitrary government interference that disfavors them in the process of selecting representatives.

Viewed as such, there can be no question that, even in the absence of a mathematically demonstrable injury, the complaint satisfies the causation and redressability requirements. Clearly, the government defendants' tax policy is the source of the distortion in the political process that plaintiffs complain of. An injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate. The standing question is unaffected by the church defendants' possible resolve to continue their current rate of political activity despite a decision requiring application of § 501(c)(3) to them and it is unaffected by plaintiffs' ultimate chances of success in their drive to preserve or expand women's rights to choose to complete or to terminate a pregnancy. That the court cannot guarantee plaintiffs' success in the

political arena does not signify that the plaintiffs cannot gain anything from this litigation. On the contrary, plaintiffs have the opportunity to redress what they perceive is a grievuous imbalance in the electoral and legislative process. It is sufficient for purposes of standing that "the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.' *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976) (emphasis added) . . . He need not show that a favorable decision will relieve his every injury." *Larson v. Valente, supra,* 102 S.Ct. 1682 n.15; *accord, id.* at 1695-96, 1696 n.6 (Rehnquist, J., dissenting).[10]

---

[10] The cases concerning challenges to the validity of the census, which defendants rely upon, are inapposite to an application of standing doctrine to the particular voter claims here. Plaintiffs in those actions alleged that "the votes of persons in some states or regions will be diluted in comparison to those in" other areas if the census was not performed in accordance with strict constitutional mandates. *See Fed'n for Am. Immigration Reform v. Klutznick, supra* 486 F.Supp. at 566; *Sharrow v. Brown,* 447 F.2d 94 (2d Cir. 1971), *cert. denied,* 405 U.S. 968, 92 S.Ct. 1188, 31 L.Ed.2d 243 (1972). Standing was denied in those cases because plaintiffs could not show that they were among those who had sustained the injury or that apportionment in the manner sought would redress the injury. These shortcomings were due to the unique nature of the census method of apportionment.

"[B]ecause of the way our method of apportionment operates" it was "impossible" for plaintiffs in *Fed'n for Am. Immigration Reform* to demonstrate that concrete harm would occur from the inclusion of illegal aliens in the census count. 486 F.Supp. at 570. Assuming that such inclusion would be unconstitutional and would result in a misallocation of some Congressional seats, the court could envision no way in which individual voters could show "which states might gain and which might lose representation." *Id.* at 567-70. Plaintiffs' complaint, thus, was fatally speculative in that it could not include an allegation that any plaintiffs would be affected by the challenged government conduct. *Id.* at 570. In other words, a given voter has no

3. *Equal Protection Standing.* Plaintiffs contend that in addition to having standing based upon injuries to rights guaranteed by the establishment clause and to their right to equal participation in the electoral process, they have standing based upon injuries to rights conferred by the equal protection provisions of the fifth amendment. The thrust and importance of this argument are unclear. Having satisfied the requirements for establishment clause and voter standing, plaintiffs can press their claims of illegal disparate treatment. Thus it appears that the so styled "equal protection" standing would not enhance plaintiffs' position. Moreover, plaintiffs have not alleged

---

standing to challenge conduct which will injure some unknown and unknowable group of voters. *See id.* at 571

In *Sharrow,* plaintiff was faced with an exceedingly burdensome, but not impossible, pleading problem. In order to show that his injury might be redressable, he needed to perform "a state-by-state study" of the effects of the claimed impropriety in the census procedures. 447 F.2d at 97. Only such analysis could show that New York was underrepresented as alleged and without this analysis he could not "establish that the failure to enforce [Section 2 of the Fourteenth Amendment] has resulted in a detriment to his rights of representation." *Id.*

The pro-choice plaintiffs need not demonstrate that the alleged discriminatory enforcement of § 501(c)(3) has resulted or will result in a specific loss in the number of pro-choice legislators, and they are not suing merely as members of a group, some of whom are likely to be injured. The *Sharrow* requirement is inapplicable because these plaintiffs allege unequal ability to *participate* in the electoral process, not actual loss of representatives vis-a-vis other groups, and they seek a non-discriminatory enforcement of the laws, not an increase in the number of offices available. The court can act upon their injury and demands without the type of statistical information required to prove injury and to structure relief in a census case. Unlike plaintiffs in *Fed'n for Am. Immigration Reform,* these voters all allege particular personal injury. This is no general claim that the census will come out "wrong" and thus harm some voters and help others. Rather, these plaintiffs allege that *all* prochoice voters, candidates and contributors have suffered the injury complained of and will benefit from the relief requested. Assuming the truth of their pleadings, each plaintiff in this category has shown particular interests at stake and likelihood of benefiting from the relief sought.

any facts that state an injury to rights conferred by the fifth amendment alone. They do not assert that the Code has been applied to them discriminatorily or that they have been denied some tax benefits to which they are entitled. The differential treatment of plaintiffs and the church that plaintiffs complain of creates a legally cognizable injury only in conjunction with plaintiffs' first amendment claims. Their acknowledgement that the Code has been applied properly to them concedes that they have not been injured, in purely fifth amendment terms, by the alleged misapplication to the church defendants. Viewed from this perspective, their "equal protection" claim is reduced to an assertion that the federal defendants are acting improperly. *Schlesinger v. Reservists Comm. to Stop the War, supra*, 418 U.S. at 216-22, 94 S.Ct. at 2929-2932, and *Valley Forge, supra*, 102 S.Ct. at 764 make clear that individuals without a personal stake, distinct from that of the public generally, in the government's observance of the law do not have standing to complain of government malfeasance. Merely asserting, as plaintiffs have done, that the government has disregarded the law in its treatment of a third party does not confer standing.

B. *Prudential Concerns*

The twenty individual plaintiffs and three of the organizational plaintiffs, ARM, NWHN and Nassau-NOW have satisfied the Article III requirements for voter standing. In addition, the clergy plaintiffs and the Women's Center have satisfied those constitutional prerequisites for establishment clause standing. Before a final decision on these parties' standing can be rendered, however, they must demonstrate that the court should not decline to confer standing because of prudential considerations. The Supreme Court has identified three such prudential limitations that will defeat the standing of a plaintiff who has satisfied the Article III case or con-

troversy requirements. Where "the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure," the exercise of federal jurisdiction is not warranted. *Duke Power Co. v. Carolina Env. Study Group, supra,* 438 U.S. at 80, 98 S.Ct. at 2634. Access to federal courts may be denied also when a plaintiff seeks to assert the legal rights of a third party. *Id.* Finally, the judiciary should avoid hearing "abstract questions of wide public significance [when] other governmental institutions may be more competent" to do so. *Warth v. Seldin, supra,* 422 U.S. at 500, 95 S.Ct. at 2205.[11]

---

[11] Defendants suggest that as part of the prudential limits on standing plaintiffs must show that they are within the "zone of interests" that § 501(c)(3) protects. Plaintiffs fail this zone of interests test, defendants maintain, because Congress never intended § 501(c) to preserve government neutrality in the electoral process. The structure of § 501(c) creates inequality among organizations depending upon the exemption for which each qualifies. For example, § 501(c)(3) organizations enjoy tax exemptions and the right to receive tax-deductible contributions at the cost of foregoing all electioneering and limiting their lobbying efforts to an insubstantial part of their activities; § 501(c)(4) organizations are not subject to these stringent requirements but they too are ineligible for tax-deductible contributions; and §501(c)(19) must observe few restrictions on their political endeavors while enjoying tax benefits equivalent to those conferred on § 501(c)(3) groups. Plaintiffs' standing, however, is not undermined by the fact § 501(c)(3) is not a general safeguard against tax policy induced economic distortions of the political marketplace because the zone of interests, or nexus text, applies only to taxpayer suits. *See Duke Power Co. v. Carolina Env. Study Group, supra,* 438 U.S. at 78-80, 98 S.Ct. at 2633-2634. Plaintiffs already have conceded that they do not have taxpayer standing. *See* note 1, *supra.* The failure of § 501(c) to preserve neutrality in government intervention into the political process has caused the United States Court of Appeals for the District of Columbia Circuit to declare the statutory scheme in violation of the Constitution. *See Taxation with Representation of Washington v. Regan,* 676 F.2d 715 (D.C.Cir.1982) (*en banc*).

These prudential factors do not dictate barring plaintiffs' opportunity to proceed with this lawsuit. Although a large number of citizens likely share the injuries alleged by the clergy under the establishment clause and by the voters and abortion rights organizations under the first and fifth Amendments, these are not "generalized grievances" such that there will by any lack of sharp controversy. Standing is not a doctrine to restrict access to the courts, and prudential concerns should not be so applied if the court is satisfied that plaintiffs bring a live and pointed controversy to it. *See, e.g., Duke Power Co. v. Carolina Env. Study Group, supra,* 438 U.S. at 80-81, 98 S.Ct. at 2634-2635 ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested" prudential concerns generally do not bar standing); *United States v. SCRAP, supra,* 412 U.S. at 687-88, 93 S.Ct. at 2415-2416 ("standing is not to be denied simply because many people suffer the same injury.") Standing rules should be invoked to ensure that the court will adjudicate only an actual case or controversy and that, as an adversarial rather than an inquisitorial tribunal, it will be fully apprised of the facts and relevant law by a vigorous and interested presentation from the litigants. There is not the slightest reason to believe that the wide dispersion of plaintiffs' injuries will diffuse the contest before the court.

The prudential limitation on standing when rights of third parties are implicated avoids "adjudication of rights which those not before the Court may not wish to assert . . . [and assures] that the most effective advocate of the rights at issue is present to champion them. *See Singleton v. Wulff,* 428 U.S. 106, 113-14, 96 S.Ct. 2868, 2873-2874, 49 L.Ed.2d 826 (1976)." *Duke Power Co. v. Carolina Env. Study Group, supra,* 438 U.S. at 80, 98 S.Ct. at 2634. This lawsuit does not present the potential problem of a disinterested plaintiff advocating the interests of persons

not before the court. Plaintiffs do not predicate their standing on the narrow *jus tertii* exceptions to the general rule that litigants must assert their own rights. The action, therefore, involves no rights that the rightholder would not wish to assert or that the plaintiffs are likely not to press vigorously.

The final prudential hurdle restricts access to judicial forums to resolve abstract policy questions of broad public importance. Courts erect this barrier from their awareness of the judiciary's limited competence to resolve societal, as opposed to personal, disputes and the superiority of other mechanisms to make complex social choices. Not all issues of broad public importance, however, are necessarily, or even better, left to the executive and the legislature. Plaintiffs do not seek resolution of "abstract questions;" they have articulated particular improper actions by the church defendants and illegal and unconstitutional disregard for that activity by the government defendants. Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating such a claim merely because of the interplay between the litigation and social controversy.

III

Defendants urge dismissal, even if plaintiffs do have standing, because the complaint does not state a claim upon which relief may be granted. Defendants contend that plaintiffs' injuries, such as they are, do not amount to actionable wrongs either as establishment of religion or unconstitutional vote dilution. The church defendants fur-

ther argue that regardless of the vitality of the complaint, it states no claim against them and that, therefore, they should be dismissed.

Plaintiffs are permitted to proceed "unless it appears beyond doubt that [they] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). Measured by this standard, counts two and three of the complaint certainly are adequate and the motion to dismiss them for failure to state a claim must be denied. Counts one and five, however, are fatally defective and must be dismissed. Plaintiffs have voluntarily withdrawn count four.

In count two of the amended complaint, plaintiffs allege that by granting the Roman Catholic Church a uniquely favored status under the tax code, the government defendants have violated their duty, arising under the first amendment, to treat all religious organizations similarly. In recent years, the Supreme Court has set out a three part test to determine establishment clause violations. A challenged government action withstands establishment clause scrutiny "if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education and Religious Liberty v. Regan,* 444 U.S. 646, 653, 100 S.Ct. 840, 846, 63 L.Ed.2d 94 (1980); *accord, Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111-2112, 29 L.Ed.2d 745 (1971); *Brandon v. Bd. of Education,* 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied,* ____ U.S. ____, 102 S.Ct. 970, 71 L.Ed.2d 109 (1982).

It is not implausible that plaintiffs will be able to adduce facts that demonstrate that the government favoritism allegedly shown to the defendants lacks secular purpose or that this preferential treatment advances the cause of the Roman Catholic Church. If plaintiffs are successful in

either of these tasks, they will have demonstrated an actionable establishment clause violation. The difficult evidentiary burdens that plaintiff must shoulder to prove these allegations do not, by themselves, justify dismissal.[12]

Defendants place undue reliance on *Walz v. Tax Comm'n of the City of New York,* 397 U.S. 664, 90 S.CT. 1409, 25 L.Ed.2d 697 (1970), in their argument that the tax benefits plaintiffs complain of do not rise to the level of actionable injuries. In *Walz,* there was no assertion of preferential treatment of one religion to the detriment of others. *See id.* at 673, 90 S.Ct. at 1413; *id.* at 689, 90 S.Ct. at 1421 (Brennan, J., concurring); *id.* at 696, 90 S.Ct. at 1425 (Harlan, J., concurring). The dictum, "[t]here is no genuine nexus between tax exemption and establishment of religion[,]" *id.* at 675, 90 S.Ct. at 1414, and the accompanying distinction between the transfer of funds to churches and abstaining from collecting taxes from them, *id.* at 674-75, 90 S.Ct. at 1414-1415, are applicable only in the context of a nondiscriminatory tax deduction extended broadly to social welfare organizations. In that circumstance, the state, by declining tax collection from all churches, observes the "wholesome neutrality" commanded by the establishment clause; taxing church property or income while all other private corporations operated for the public benefit were granted an exemption would constitute hostility to religion that the first amendment forbids. *Walz v. Tax Comm'n of the City of New York, supra,* 397 U.S. at 696-97, 90 S.Ct. at 1425-1426 (Harlan, J., concurring). When, as here, the government conditions that tax advantage on abstinence from the political arena, but waives that condition for a single

---

[12] The neutrality of the statute itself, of course, does not immunize defendants if they apply that statute in a manner that favors one religion over all others. *See, e.g., Fowler v. Rhode Island,* 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); *Niemotko v. Maryland,* 340 U.S. 268, 271-73, 71 S.Ct. 325, 327-328, 95 L.Ed. 267 (1951).

religious group, the waiver, rather than the exemption itself, runs afoul of the constitution. Even if the "tax subsidy" granted through § 501(c)(3) is not establishment *per se,* the preferential treatment shown to one religious group carries the appearance of an improper endorsement of sectarian belief.

In count three, plaintiffs allege a violation of their fifth amendment rights to due process, including equal protection of the law, by the government defendants' failure to revoke the church's § 501(c)(3) status. The gravamen of this claim is the adverse impact on the plaintiffs' political voice that results from the government's financial sponsorship of the plaintiffs' opponents in a bitter public controversy. *Baker v. Carr, supra,* and it progeny confirmed that individuals have a right to equal participation in the electoral process and to be free from arbitrary government action that favors the political strength of some persons relative to others. *See, e.g., Reynolds v. Sims,* 377 U.S. 533, 554-68, 84 S.Ct. 1362, 1377-1384, 12 L.Ed.2d 506 (1964); *Shakman v. Democratic Organization of Cook County, supra,* 435 F.2d at 270; *Tax Analysts and Advocates v. Simon, supra,* 376 F.Supp. at 899. The defendants concede the existence of this right, but they argue that it is limited to protection against mathematical dilution of the vote. This reiteration of the argument made against the plaintiffs' claim of voter standing fails for the reasons similar to those found to support that standing. *See* pp. 480-483 *supra.* The *Baker* opinion evinces no indication that the right it recognized is fact-bound to the circumstances of the case. If the plaintiffs can prove that the government defendants have conferred a financial benefit on the church and that the benefit disadvantages the plaintiffs in electoral contests, then the plaintiffs will have made a prima facie case for relief. Congress is not free to subsidize the lobbying or electioneering activities of one group while arbitrarily denying the subsidy to others.

Taxation with Representation of Washington v. Regan, supra, at 716. Similarly, the administrators of our laws are not free to condition the grant of a subsidy upon total abstinence from campaigning and minimal engagement in lobbying and then, without reason, to exempt one group from that requirement while allowing it the subsidy.[13]

In count five, plaintiffs seek a writ of mandamus to compel the government defendants to enforce the Code against the church defendants. It is firmly established that ordinarily mandamus relief is available only to compel ministerial administrative actions. *See e.g., Leonhard v. Mitchell,* 473 F.2d 709, 712-13 (2d Cir.), *cert. denied,* 412 U.S. 949, 93 S.Ct. 3011, 37 L.Ed.2d 1002 (1973); *Lovallo v. Froehlke,* 468 F.2d 340, 343, 345-46 (2d Cir. 1972), *cert. denied,* 411 U.S. 918, 93 S.Ct. 1555, 36 L.Ed.2d 310 (1973). It is equally accepted that discretion permeates IRS tax assessment and collection decisions. *See e.g., Bob Jones Univ. v. Simon,* 416 U.S. 725, 749-50, 94 S.Ct. 2038, 2052-2053, 40 L.Ed.2d 496 (1974); *American Ass'n of Commodity Traders v. Dep't of Treasury,* 598 F.2d 1233, 1235 (1st Cir. 1979). Accordingly, mandamus is an inappropriate remedy in this action.

Count one states simply that "[t]he activities of the Roman Catholic Church violate § 501(c)(3) of the Code and the First Amendment to the Constitution." This count fails to state a claim against the church defendants because they are incapable of violating the first amendment and they have breached no duty imposed by the Code and to plaintiffs.

---

[13] The court makes no judgment at this time on the appropriate standard of review for these claims. The Court of Appeals for the District of Columbia Circuit recently applied the strict scrutiny test to claims, analogous to those at bar, that § 501(c) of the Code facilitated the speech of some persons over others. *See Taxation with Representation of Washington v. Regan, supra,* at 723-731.

The constitutional prohibition against establishment of religion prohibits government activities that enhance the status of one theology over all others or the status of religious beliefs and organizations generally over non-religion. Like all other protections afforded by the Bill of Rights, this stricture does not restrict purely private corporate action. Admittedly, the line between the public and the private is indistinct and, some say, vanishing, but the activities of the Roman Catholic Church, as alleged in the amended complaint, do not even approach this disputed border. Therefore, no action can proceed against the church defendants based on their abridgement of plaintiffs' first amendment, guaranteed rights.

The complaint also fails to state a violation of § 501(c)(3) by the church defendants. They have received a determination letter from the IRS that confirms their tax-exempt status. Even if, as plaintiffs contend, that letter was erroneously or illegally issued, the church is entitled to rely upon it and withhold payment of taxes. The Code imposes no duty upon the church to gain pre-clearance from the IRS before embarking on activities that might trench upon the § 501(c)(3) prohibitions against political activity. If the church does engage in these proscribed endeavors, then it is liable to revocation of its exemption, but as long as it holds that exemption, it cannot be said to have violated the Code.

Moreover, the plaintiffs, by their own admission, have no direct grievance with the church defendants. The injuries set out in the complaint arise from illegal and unconstitutional government action. Plaintiffs concede that they do not seek to terminate the Roman Catholic Church's political program; they desire to place the church on an equal footing with themselves in the political battle over the right to choose to have an abortion. The disadvantage plaintiffs suffer comes from government indifference to church excesses and it is against the government, not the church, that plaintiffs have stated a claim.

IV

Defendants' final assault on the action flows from statutory and common law prescriptions against judicial review of plaintiffs' claims. Defendants contend that the doctrine of non-reviewability of certain administrative or prosecutorial decisions precludes consideration of the action. In addition, defendants maintain that Congress has explicitly excluded lawsuits such as this from those in which injunctive or declaratory relief is available.

A. *Reviewability of Administrative or Prosecutorial Discretion*

As a general rule, courts will review administrative actions in the absence of a clear and convincing showing of contrary legislative intent. *Eastern Ky. Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1285 (D.C.Cir.1974), *vacated on other grounds*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Medical Comm. for Human Rights v. Sec. & Exch. Comm'n*, 432 F.2d 659, 666 (D.C.Cir.1970), *vacated as moot*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510, 18 L.Ed.2d 681 (1967). Tempering this presumption is the recognition of a generous grant of discretion to the executive, particularly in decisions to prosecute law violators. *See, e.g., Marshall v. Jerrico*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974); *Kixmiller v. Sec. & Exch. Comm'n*, 492 F.2d 641, 645 (D.C.Cir.) (1974).

This action fits much more closely within the rule allowing review than the rule excluding it. No statute explicitly bars all judicial review of IRS decisions concerning tax-

payer status.[14] To the contrary, Congress recently added to the Code a section explicity permitting judicial review of IRS decisions denying an organization § 501(c)(3) status. *See* Pub.L. 94-455, Title XII, § 1203(b)(2)(A), 90 Stat. 1690 (1976), codified at 26 U.S.C. § 7428 (1976).[15] The jurisdictional restrictions contained in this section of the Code—limiting § 7428 suits to taxpayer actions for declaratory relief—do not undermine the inference that Congress recognizes the *competence* of the judiciary to reevaluate and where necessary to supervise IRS decisions concerning the award of § 501(c)(3) status. There is no significant difference in the decisional task presented to the courts in determining whether an organization has improperly been denied an exemption and in determining whether it has improperly been granted one. Both decisions require consideration of complex federal revenue collection policies. Both require delving into the nature of the taxpayer, its expenditures and its activities. Neither is susceptible to simple application of rules to facts.

Defendants place undue reliance on the doctrine of nonreviewable prosecutorial discretion. Their most compelling argument draws upon the deference courts show to executive decisions to allocate law enforcement resources in

---

[14] As discussed *infra*, pp. 489-90, the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1976), and the Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. IV 1980) restrict the scope of remedies available in tax related controversies. Neither of these statutes, however, can be construed as a blanket preemption of judicial review of taxpayer status. They are limitations on remedies only.

[15] Section 7428 authorizes certain organizations whose application for tax-exempt status is denied or revoked to bring an action for judicial declaration of the organization's entitlement to the exemption. *See* 26 U.S.C. § 7428 (1976).

a manner that the executive deems most efficacious. Offsetting this resource efficiency argument, however, is the consistent judicial intervention into prosecutorial decisions that fail "to promote the ends of justice and den[y] rights conferred upon a citizen by the Constitution and by federal law." *NAACP v. Levi*, 418 F. Supp. 1109, 1116 (D.D.C.1976); *see Nader v. Saxbe*, 497 F.2d 676, 679 n.19 (D.C.Cir.1974); *Adams v. Richardson*, 480 F.2d 1159, 1166 (D.C.Cir.1973). Moreover, this action is distinguishable from the ordinary instance of unreviewable prosecutorial discretion where the executive must choose from among many malfeasors those against whom it will enforce the law. Here, by contrast, the plaintiffs seek to compel the government to conform its actions to the law. They do not sue, for example, under a statute that criminalizes certain private behavior nor do they complain that the executive has failed to penalize a third party's violation of that statute. Rather plaintiffs allege that the IRS has illegally acted to bestow a tax benefit upon an unqualified organization. Plaintiffs do not seek to force the executive to expend its resources to prosecute a law violator; they are using their own resources to compel the government defendants to observe Congressionally and constitutionally imposed strictures on defendants' official actions. In sum, this case presents almost none of the circumstances that give rise to judicial deference to prosecutorial discretion.

B. *The Anti-Injunction Act*

The Code expressly prohibits, with certain exceptions not relevant here, all "suit[s] for the purpose of restraining the assessment or collection of any tax . . ." 26 U.S.C. § 7421(a) (1976). Defendants contend that this litigation falls within the prohibited category.

Reference to the words of the statute alone places plaintiffs' case beyond its purview. The complaint seeks an injunction commanding, not forbidding, the collection of taxes. Peering behind the words provides no greater support for defendants' position.

This section of the Code, known as the Anti-Injunction Act, apparently has no recorded legislative history. *Bob Jones Univ. v. Simon, supra*, 416 U.S. at 736, 94 S.Ct. at 2045. Courts have interpreted the statute as ". . . the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference . . ." *Id.; see Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962). Defendants argue that this government need to ensure an unimpeded flow of revenue can be frustrated by suits, such as the case at bar, that challenge taxpayer status and compel tax collection because such suits place demands upon the IRS equivalent to actions to restrain collection. This argument is not without some merit, particularly because a successful third party action compelling tax assessment will likely be followed by a taxpayer suit under 26 U.S.C. § 7428 seeking a declaration of entitlement to an exemption. Such litigation over the right of an organization to enjoy certain privileges under the Code has the potential to encumber substantial IRS resources even if it does not directly interfere with the flow of revenue.

The majority of the courts that have considered the scope of the Anti-Injunction Act, however, have declined to interpret its prohibitions as broadly as defendants suggest. The consistent theme in these decisions is that the statute only extends to those actions it expressly refers to and that its effect is to require that taxpayers who object to the payment of taxes pay the assessment and sue for a refund. *See, e.g., Wright v. Regan*, 656 F.2d 820, 836 n.52

(D.C.Cir.1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (Dec. 12, 1981) (No. 81-970); *Tax Analysts and Advocates v. Shultz*, *supra*, 376 F.Supp. at 891-92; *Eastern Ky. Welfare Rights Organization*, *supra*, 506 F.2d at 1284; *McGlotten v. Connally*, 338 F.Supp. 448, 453-54 (D.D.C.1972) (three judge court). Persuasive reasoning supports these decisions. Third party suits to compel tax collection as a means to vindicate plaintiffs' rights do not pose the threat of clogging the federal revenue pipeline that taxpayer-sought injunctions would present because third party suits are " 'few and far between[.]' " *Wright v. Regan*, *supra*, 656 F.2d at 836 n.52. The Anti-Injunction Act would have a draconian effect beyond what Congress explicitly required if it were applied in these circumstances because it would foreclose any relief to third parties injured by executive decisions not to assess or collect taxes. The taxpayer who is unable to prevent collection because of the Act has open to it an alternative avenue of relief—a suit for refund. Plaintiffs here, and any person having a right to complain of another's lack of tax liabilities, by contrast, would have no means of redress if the Act preempted this lawsuit. *See Bob Jones Univ. v. Simon*, *supra*, 416 U.S. at 746, 94 S.Ct. at 2050; *National Restaurant Ass'n v. Simon*, 411 F.Supp. 993, 996 (D.D.C.1976); *McGlotten v. Connally*, *supra*, 338 F.Supp. at 453-54. In light of the clear language of the statute and the strong and compelling authority limiting application of the statute to actions to restrain tax collection, plaintiffs are not barred from proceeding by the Anti-Injunction Act.

C. The Declaratory Judgment Act

In addition to their prayer for an injunction, plaintiffs seek a declaration that defendants have violated the Code and Constitution. The Declaratory Judgment Act confers jurisdiction on the court to issue such relief "except with respect to [controversies concerning] Federal taxes other

than the actions brought under Section 7428 of the Internal Revenue Code of 1954, . . ." 28 U.S.C. § 2201 (Supp. IV 1980).

Conceding that they cannot bring a § 7428 action, plaintiffs change hats from those of the strict constructionists who advocated a literal reading of the Anti-Injunction Act to those of contextualists who argue that that statute and the Declaratory Judgment Act share the same purpose and thus should be interpreted to be coextensive. Plaintiffs' only support for this proposition is dicta from several opinions that interpreted the two laws as "coterminous." *McGlotten v. Connally, supra*, 338 F.Supp. at 453; *see Bob Jones Univ. v. Simon, supra*, 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7 (Declaratory Judgment Act restriction is "at least as broad as the Anti-Injunction Act"). Plaintiffs' authorities do not support the broad proposition that any tax case ripe for injunctive relief also is ripe for declaratory relief; those cases stated only that it appeared that Congress intended to exclude from the Declaratory Judgment Act *at least* those cases, other than § 7428 actions, that could not be brought because of the Anti-Injunction Act. *See Bob Jones Univ. v. Simon, supra*, 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7.

Declaratory relief and injunctive relief are two different forms of the courts' remedial powers; there is no inherent reason that the two should be interpreted as equal in scope. Congress extended the Declaratory Judgment Act and created the § 7428 remedy in response to the *Bob Jones Univ.* decision. *See* S.Rep.No.94-938, 94th Cong., 2d Sess. 586-87, *reprinted in* [1976] U.S. Code Cong. & Ad.News 3439, 4010-11. Nothing in the wording that Congress chose to allow these taxpayer suits for a declaration of a right to § 501(c)(3) status indicates that it desired to define the scope of the available remedy in terms of judicially recognized exceptions to the Anti-Injunction Act. The different purposes of the declaratory and the injunctive remedies—the former allows a litigant to seek an

order from the court before subjecting itself to liability, for example, by not paying taxes, while the latter more often is invoked to terminate ongoing injurious activity—suggests that the absence of cross-references between the Declaratory Judgement and Anti-Injunction Acts resulted from a conscious tailoring of each to the circumstances Congress thought most befitting. The Anti-Injunction Act, by its narrow wording, permits suits to compel collection of taxes; such suits will be brought by parties whose tax status is not in dispute in the litigation and who, as plaintiffs here, can have standing only if they can show that a third party's privileged tax status imposes on them a discrete and palpable injury. At that point the opportunity for a declaration of rights would be surplusage. The party seeking to adjudicate its own tax status presents a very different injury, the denial of an exemption from future taxation. A declaration of its right to the exemption can prevent if from suffering any permanent damage, but allowing such a party to seek an injunction would interrupt collection of federal revenues and thereby promote the principal mischief Congress sought to prevent through the Anti-Injunction Act. This analysis supports defendants' position that no declaratory relief is available to plaintiffs.

V

Pursuant to the preceding discussion, the motion to dismiss is granted in part and denied in part. The church defendants motion to dismiss themselves from the lawsuit is granted. Plaintiffs Laurel Clinic, Inc., The Federation of Feminist Women's Health Center, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc., and Women's Health Services, Inc. are dismissed for lack of standing. The motions to dismiss the other plaintiffs are denied. The twenty individual plaintiffs have standing as voters to contest the

alleged infringement of their right to participate in the political process on equal terms with all others and free from arbitrary government interference. *ARM*, Nassau-NOW, and the National Women's Health Network, Inc. have standing to represent their voter-members injured by the challenged government conduct. In addition, the clergy plaintiffs and the Women's Center for Reproductive Health have satisfied the requirements to bring an action complaining of an unconstitutional establishment of religion. The motions to dismiss for failure to state a claim upon which relief may be granted or because the action is barred by the Anti-Injunction Act or the doctrine of administrative discretion are denied. The court finds that the Declaratory Judgment Act does not authorize relief in this action.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

No. 80 Civ. 5590 (RLC).

ABORTION RIGHTS MOBILIZATION, INC., ET AL., PLAINTIFFS,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE, DEFENDANTS.

Dec. 2, 1982.

OPINION

ROBERT L. CARTER, District Judge.

In an opinion reported at 544 F.Supp. 471 (1982), familiarity with which is assumed, the court dismissed some of the plaintiffs, the United States Catholic Conference Incorporated and the National Conference of Catholic Bishops ("church defendants") from the action, and ordered the remaining parties—plaintiffs, the Secretary of the Treasury and the Commissioner of Internal Revenue ("federal defendants" or "government")—to proceed with pretrial preparations. The federal defendants have now moved, pursuant to 28 U.S.C. § 1292(b), for certification to the Court of Appeals of two questions: (1) whether the remaining plaintiffs have standing to challenge the Commissioner's determination of the tax status of another; and (2) whether, in any event, the instant litigation can proceed in light of the Anti-Injunction Act, 26 U.S.C. § 7421. Federal Defendants' Memorandum

of Law at 3. In addition, a stay of discovery is sought pending disposition by the Court of Appeals of these two questions.

Section 1292(b) permits an immediate appeal of an interlocutory order of the district court, if the court certifies that its determination "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." The federal defendants contend that both questions which they seek to have the court certify meet this statutory standard. They argue that both questions concern subject matter jurisdiction which is "[a]mong the categories of rulings . . . obviously suited for interlocutory appeal," *quoting from* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure,* § 3931 at 178 (1977). They further maintain that there is substantial ground for difference of opinion as to whether the court's holding that plaintiffs could proceed with the action and that the Anti-Injunction Act did not bar the litigation is supportable under applicable law. Federal Defendants' Memorandum of Law at 6-12.

The church defendants, in a letter dated October 26, 1982, join the government in urging that the two indicated questions be accorded § 1292(b) certification, and, somewhat surprisingly, since they are no longer parties to the litigation, support the government's motion that discovery be stayed. Plaintiffs oppose both parts of the motion.

In *Brown v. Bullock,* 294 F.2d 415, 417 (2d Cir.1961), Judge Friendly, writing for the court *en banc,* set forth the yardstick used in this circuit to determine whether § 1292(b) certification is appropriate. There he said that certification of issues of first impression was desirable if their resolution would avoid a lengthy trial and "determination was likely to have precedential value for a larger number of other suits . . . now pending." *Id.*

In support of its motion, the government cites several cases involving certification of issues of subject matter jurisdiction involving the jurisdictional reach of the federal securities laws: *Bersch v. Drexel Firestone, Inc.*, 389 F.Supp. 446, 464 (S.D.N.Y.1974) (Carter, J.), *aff'd in part*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir.1972); *Movielab, Inc. v. Berkley Photo, Inc.*, 452 F.2d 662 (2d Cir.1971). The government also cites *Blackman v. Hadron, Inc.*, 450 F.2d 781 (2d Cir.1971), in which the question was whether, in the light of the withdrawal of all charges of direct infringement, a present justiciable issue remained on the basis of "the use of actual or threatened infringement suits to deprive Hadron of its customers, coupled with charges of contributory infringements against Hadron . . . " *Id.* at 782.

None of these cases advance the government's argument for § 1292(b) certification. *Bersch, Leasco* and *Movielab* involved various aspects of the as yet undetermined issue of the extra-territorial reach of the federal securities laws. In these cases, the issues were whether in this unsettled area the trial court had applied the appropriate legal standard, and whether, since issues of comity, foreign relations and judicial resources would be affected by the determination, policy considerations warranted the decision reached. As to *Hadron,* I doubt that certification would be accepted today, or if accepted, I believe it would subsequently be remanded as having been improvidently granted. *See e.g., Slade v. Shearson, Hammill & Co.*, 517 F.2d 398 (2d Cir.1974).

[1, 2] In any event, § 1292(b) certification is limited to extraordinary cases where early appellate review might avoid protracted and expensive litigation. It is not intended as a vehicle to provide early review of difficult rulings in hard cases. *United States v. Woodbury*, 263 F.2d

784, 788 n. 11 (9th Cir.1959). Nor is it appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts. *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 863 (3d Cir.), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The question concerning plaintiffs' standing which the government seeks to have certified for review does not concern a dispute or disagreement as to the applicable law, but instead it involves whether the court's application of the decided and governing case law to the relevant facts is appropriate. I do not believe such issues were intended for certification under § 1292. *Id.*

As to the second question, there is little dispute on the basis of the current status of the law that the court followed the prevailing and modern view of the reach of the Anti-Injunction Act. *See Wright v. Regan,* 211 U.S.App.D.C. 231, 656 F.2d 820, 836 n. 52 (1981). Hence, that does not appear to be an appropriate issue for § 1292(b) certification.

Moreover, even assuming the two questions might be otherwise appropriate for § 1292(b) certification, there has been no showing, nor, indeed, argument that resolution of the questions the government seeks to have certified is likely "to have precedential value" for any significant number of cases now pending on the Court of Appeals calendar. *See Brown v. Bullock, supra,* 294 F.2d at 417.

Finally, the calendar of the Court of Appeals is heavy. It is probably not disposed to being faced with abstract issues which may not be implicated if the case proceeds to judgment on the merits. On the other hand, if those issues are still present on appeal after trial on the merits, they will have been embellished by a full record in the proceedings below.

The motion for § 1292(b) certification is denied. In light of the above disposition, there is no basis for a stay of discovery. The parties should proceed promptly to complete all the trial preparation as expeditiously as possible.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

No. 80 Civ. 5590 (RLC).

ABORTION RIGHTS MOBILIZATION, INC., ET AL., PLAINTIFFS,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, AND ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE.

Feb. 27, 1985.

OPINION

ROBERT L. CARTER, District Judge.

This renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is based upon the recent Supreme Court decision in *Allen* v. *Wright,* ____U.S. ____, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The question presented is whether and to what extent the *Allen* opinion affects the outcome reached by the court in *Abortion Rights Mobilization, Inc.* v. *Regan,* 544 F.Supp. 471 (S.D.N.Y. 1982) (Carter, J.) ("*ARM*"), with which familiarity is assumed. *ARM* held that the clergy plaintiffs and the Women's Center for Reproductive Health had standing under the establishment clause, and that 20 individuals and three tax-exempt organizations had standing as voters in this litigation.[1]

---

[1] As a further result of *ARM*, five of the original plaintiffs, all abortion clinics, were denied standing for failure to show injury in fact and two of the original defendants, the United States Catholic Conference and the National Conference of Catholic Bishops, had the

The Sumpreme Court held in *Allen* that a nationwide class of parents of black children attending public schools in districts undergoing desegregation, but who had not actually been denied entry to allegedly discriminatory private schools, did not have standing to challenge the tax exempt status of those schools.

In applying *Allen* to the present case it must first be noted that the Court did not close the door on private suits challenging government grants of tax exemption, *see Allen,* 104 S.Ct. at 3332 (noting possible propriety of standing in *Coit v. Green,* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971), *summarily aff'g. sub nom., Green v. Connally,* 330 F.Supp. 1150 (D.D.C.), which made allegations comparable to those in *Allen* but with different facts), but used traditional analysis in concluding that the *Allen* plaintiffs lacked standing.

The Court held that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 104 S.Ct. at 3325. This is an integral part of the precedent upon which both *Allen* and *ARM* were decided. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 102 S.Ct. 752, 757-761, 70 L.Ed.2d 700 (1982); *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). Separation of powers, as *Allen,* 104 S.Ct. at 3330 n. 26, clearly demonstrates, is not a distinct line of analysis but serves as the basis of the "traceability" part of the traditional three part standing test of personal injury fairly traceable to the defendant's allegedly illegal conduct which is likely to be remedied by the requested relief. *Id.* at 3325.[2]

---

complaint against them dismissed since they were incapable of violating the First Amendment and had not violated the Internal Revenue Code in light of an explicit tax exemption from the IRS.

[2] While the "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated as two

More specifically, plaintiffs in *Allen* asserted two types of damage: the first was characterized as either a generalized injury based upon the government's behavior in granting tax exemptions to the schools or as denigration suffered by all blacks as a result of government discrimination. In either case, the Court found the harm to be insufficiently personal to constitute a justiciable cognizable injury. *Id.* at 3326. The second alleged injury was the children's diminished ability to receive an education in a racially integrated school. *Id.* at 3328. This was found wanting because desegregated schooling was not fairly traceable to the allegedly illegal conduct of the IRS. *Id.* at 3326.

A

While it is clear that stigmatizing injuries are the sort of noneconomic wrongs caused by government conduct that sometimes can be sufficient to support standing, *Heckler v. Mathews*, 465 U.S. ____, ____, 104 S.Ct. 1387, 1395, 79 L.Ed.2d 646 (1984), such status is accorded only to those who can allege a resultant harm to a concrete, personal interest. *Allen*, 104 S.Ct. at 3327-328. The *ARM* decision used this analysis to find that the lay and organizational plaintiffs did not have standing while the clergy plaintiffs and the Women's Center for Reproductive Health, a church affiliated guidance service, asserted a "compelling and personalized" injury, *ARM*, 544 F.Supp. at 479, that "diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message." *Id.* at 480. Such allegations meet the test enunciated in *School*

---

facets of a single causation requirement, both *Allen* and *ARM* treat them as distinct inquiries for analytical purposes. *Allen*, 104 S.Ct. at 3326 n.19; *ARM*, 544 F.Supp. at 478. The same practice will be followed here.

District of Abington Township, Pa. v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), that would-be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed." *Id.* at 224 n. 9, 83 S.Ct. at 1572 n. 9.

Personal injury, however, is not enough. Plaintiffs must also clear the two additional hurdles of the standing test. This court in *ARM*, found plaintiffs' establishment clause injury to be traceable to defendants' conduct because "[t]acit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries." *Id.* at 480. The court therefore found plaintiffs' asserted injuries to be tracable to "official approval of an orthodoxy antithetical to [plaintiffs'] spiritual mission." *Id.*

> Their injury flows directly from the federal defendants allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury.

Id.

This finding is consistent with *Allen*. *Allen* holds that tax exemption granted to an organization that allegedly practices an illegal activity does not in itself constitute the necessary connection between government action and injuries that flow from the activity. The lack of desegregated schooling, defined in *Allen* as a cognizable injury, was not found directly traceable to government action. "From the perspective of the IRS, the injury to respondents is highly indirect and 'results from the independent action of some third party [i.e., the discriminatory private school]

not before the court.' " *Allen*, 104 S.Ct. at 3328, quoting, in part, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). The Court stated that if a direct link between tax exemption and desegregation could be established, i.e., if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration, then the alleged injury would be fairly traceable to unlawful IRS grants of tax exemptions. *Allen,* 104 S.Ct. at 3328.

Similarly, redress of the establishment clause injury sustained in *ARM* does not depend upon any action by a third party. Redress will come directly from the government's consistent enforcement of the tax laws, not from any change in the political activities of the Church. Plaintiffs' establishment clause injury centers on the quasi-official imprimatur accorded the anti-abortion activities of the Church through tax exemptions and the restrictions placed on the establishment clause plaintiffs' political activities by § 501(c)(3). Whether the allegations can be proved is not a question for this court now to decide since it must accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 109, 99 S.Ct. 1601, 1612, 60 L.Ed.2d 66 (1979).

It is thus apparent that *Allen* supports the court's earlier decision which denied standing under the establishment clause to those plaintiffs who, similar to those in *Allen*, asserted only general claims of denigration, but which granted standing to those plaintiffs who could pass the three part test of distinct personal injury, direct traceability, and possible redress by defendants.

B

As pointed out in the earlier opinion, it has consistently been held that voters have standing to contest the alleged infringement of their right to participate in the political process on equal terms with all others free from arbitrary government interference. *ARM*, 544 F.Supp. at 480-481 citing *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (plaintiffs' unjustifiable inequality vis-a-vis voters in other counties justified standing); *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315 (N.D.Ill.1979) (standing granted to challenge patronage system because of the alleged injury to plaintiffs' interest in an equal chance and an equal voice in the election process); *Tax Analysts and Advocates v. Shultz*, 376 F.Supp. 889 (D.D.C.1974) (non-profit corporation and one of its members granted standing to challenge revenue ruling concerning campaign gifts because alleged diminution of one's vote and dilution of the ability to affect the electoral process are judicially recognized wrongs and are thus sufficient allegations of actual injury); *Common Cause v. Democratic National Committee*, 333 F.Supp. 803 (D.D.C.1971) (allegations that several national committees of political parties circumvented the statute placing limits on individual campaign contributions, thereby diluting plaintiffs' participation in the voting process, were sufficient to find standing).

Here again, mere personal injury is not enough. Defendants argue that *Allen's* yardstick in regard to traceability and redressability require that voter standing be denied in this case. Defendants, however, misconstrue the basis for the *ARM* holding that voter standing requirements have been met. The injury to plaintiffs is not, as defendants state, "alleged politicking by the Catholic Church." *Defendants' Memorandum of Law in Support of Their Renewed Motion to Dismiss* at 15, but the alleged arbitrary inequality of the plaintifs in the political process

vis-a-vis the Catholic Church created by the IRS's grant of tax exemption to the latter. The judicially cognizable injury in *Allen* was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in *ARM* is unequal footing in the political arena, a condition completely traceable and within the control of the IRS. The *Allen* analysis and *ARM*'s are, therefore, as one and the court's earlier holding granting standing to the present plaintiffs remains unaffected by *Allen*.

C

Moreover, in *ARM*, the successful plaintiffs were found to have surmounted the three prudential limitations that can defeat standing even when the Article III case or controversy standards are met. *ARM*, 544 F.Supp. at 484. The three prudential limitations preclude standing when: (1) the harm asserted amounts to only a generalized grievance shared by a large number of citizens in a substantially equal measure, (2) plaintiffs assert the rights of third parties, or (3) abstract questions of wide public significance are presented when other governmental institutions may be more competent to decide them.[3] *Id.* (citations omitted). *Allen* does not reach these issues, but its analysis is fully congruent with *ARM*'s treatment of these considerations.

Concerning the "generalized grievance" limitation, *ARM* fully analyzed the specificity of the remaining plaintiffs' injuries, distinguishing the harm to clergy plaintiffs and the Women's Center for Reproductive Health from

---

[3] The "zone of interests" test was held to be inapplicable to the *ARM* context since that test applies only to taxpayer suits and plaintiffs concede that they do not have taxpayer standing. *ARM*, 544 F.Supp. at 484 n. 11; *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-79, 98 S.Ct. 2620, 2633-2634, 57 L.Ed.2d 595 (1978).

that complained of by the excluded plaintiffs as well as plaintiffs in, *e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). *ARM*, 544 F.Supp. at 4477-480, 484. Voter standing is also particularized since plaintiffs, despite articulated desires to be politically active on behalf of their pro-choice views, can not do so without risking their valuable § 501(c)(3) status. This personal denial of equal treatment is precisely the type of standing required by *Allen* since parent plaintiffs in that case "were not personally denied equal treatment by the challenged discriminatory conduct." *Allen,* 104 S.Ct. at 3327.

The question of whether plaintiffs are addressing other parties' rights was answered squarely in the negative by *ARM*, 544 F.Supp. at 485. Since no assertion otherwise is made by defendants and *Allen* is silent on the issue, the previous ruling need not be disturbed.

Finally, there is the matter of whether other governmental institutions may be more competent to decide this issue. As stated in *Allen* and noted in defendants' briefs, the separation of powers doctrine.

> counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch and not to the Judicial Branch the duty to 'take care that the laws be faithfully executed.' U.S. Const. Art. II, § 3. We could not recognize [plaintiffs'] standing in this case without running afoul of the structural principle.[26]

---

[26] . . . [O]ur analysis of this case does not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable. . . . Rather we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement.

Allen, 104 S.Ct. at 3330.

Whether courts provide an appropriate forum for deciding the matter presented thus implicates questions considered in the Article III analysis. This dovetailing of constitutional and prudential concerns was explicitly recognized by *Allen*:

> Case or controversy considerations, the Court observed in *O'Shea v. Littleton*, . . . 414 U.S. [488,] 499, 94 S.Ct. [669,] 677 [, 38 L.Ed.2d 674 (1974),] 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.' . . . Most relevant to this case is the principle articulated in *Rizzio v. Goode* . . . 423 U.S. [362,] 378-379, 96 S.Ct. [598,] 607-608 [, 46 L.Ed.2d 561 (1976)]:
>
> > 'When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs,' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 [, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230] (1961), quoted in *Sampson v. Murray*, 415 U.S. 61, 83 [, 94 S.Ct. 937, 949, 39 L.Ed.2d 166] (1974). *Id.*

In addition to the previously discussed finding of direct harm to plaintiffs and its traceability to defendants' actions, *ARM* further addressed this final prudential concern of limiting judicial activity to the enforcement of "specific legal obligations whose violation works a direct harm," *Allen*, 104 S.Ct. at 3330, by holding that:

> Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress has already made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress' com-

> mands concerning taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating a claim merely because of the interplay between the litigation and social controversy.

ARM, 554 F.Supp. at 485

For the above stated reasons, defendants' renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is denied.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

---

80 Civ. 5590 (RLC).

ABORTION RIGHTS MOBILIZATION, INC., ET AL., PLAINTIFFS,

v.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE.
DEFENDANTS.

[Filed July 15, 1985]

OPINION

CARTER, District Judge

In 1980, plaintiffs filed suit challenging the grant of tax exempt status to the Roman Catholic Church in the United States (the "Church") on the basis of allegations that the Church's involvement in the abortion controversy constituted behavior violative of 26 U.S.C. § 501(c)(3). Since that time, this court has published three opinions regarding plaintiffs' standing to bring such an action. Familiarity with these opinions is assumed. Briefly, the first decision denied standing to several plaintiffs for failure to show injury in fact while upholding the right of present plaintiffs to maintain the suit. *Abortion Rights Mobilization, Inc. v. Regan,* 544 F. Supp. 471 (S.D.N.Y. 1982) (Carter, J.) ("*ARM I*"). The second decision denied defendants' motion for certification of an interlocutory appeal from *ARM I. Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982) (Carter, J.) ("*ARM II*"). The third decision denied defendants' renewed motion to dismiss the complaint on grounds that plaintiffs lacked

standing based upon the Supreme Court's recent decision in *Allen v. Wright*, ____ U.S. ____, 104 S.Ct. 3315 (1984). *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) (Carter, J.) ("*ARM III*"). Defendants now move pursuant to 28 U.S.C. § 1292(b) for certification of an interlocutory appeal from *ARM III*. Defendants also seek a stay of discovery pending disposition of the certification motion, a moot point in light of the instant opinion.

Section 1291(b) permits an immediate appeal of an interlocutory order of the district court, if the court certified that its determination "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." It is the rule of this circuit that certification of issues of first impression is desirable if this resolution will avoid a lengthy trial and determination is likely to have precedential value for a large number of pending suits. *Brown v. Bullock*, 294 F.2d 415, 417 (2d Cir. 1961), cited by *ARM II, supra*, 552 F. Supp. at 366. While resolution of the standing question in the negative would avoid a lengthy trial on the merits, defendants have presented no similar cases pending in the circuit that require appellate guidance. It is insufficient to maintain, as defendants state, that "several hundred thousand organizations have tax exempt status, each one of which is a potential target for litigation by any 'concerned citizen' who alleges opposition to the position of the organization or, worse yet, anyone with an 'ax to grind.' " Not only is such an argument irrelevant to the circuit's clear requirement of pending suits but defendants twist the reasoning of this court which held that compelling and personalized injury was required for standing, *ARM III, supra*, 603 F. Supp. at 972;

ARM I, supra, 544 F. Supp. at 479, and, indeed, dismissed certain plaintiffs for their inability to substantiate such injury. *ARM I, supra,* 544 F. Supp. at 478-479.

As this court stated in *ARM II*:

> [T]he question concerning plaintiffs' standing which the government seeks to have certified for review does not concern a dispute or disagreement as to the applicable law, but instead it involves whether the court's application of the decided and governing case law to the relevant facts is appropriate. I do not believe such issues were intended for certification under § 1291.

ARM II, supra, 552 F. Supp. at 366, citing *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 863 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977). The government has made no stronger showing as to such a dispute than when certification was first denied in 1982.

For these reasons the motion for certification of an interlocutory appeal from the court's previous order is denied.

IT IS SO ORDERED.

Dated: New York, New York
July 12, 1985

/s/ ROBERT L. CARTER
Robert L. Carter
U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

---

80 Civ. 5590 (RLC).

ABORTION RIGHTS MOBILIZATION, INC., ET AL., PLAINTIFFS,

v.

JAMES BAKER, III, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE, ET AL.,
DEFENDANTS.

May 8, 1986

OPINION

Plaintiffs, on March 19, 1986, renewed their motion for an order adjudging the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") in civil contempt. In a letter dated March 6, 1986, counsel for the USCC/NCCB stated that the "USCC/NCCB have asked me to advise the Court that they cannot, in conscience, comply with the subpoenas in question." The USCC/NCCB are unquestionably in contempt; what is at issue is their *bona fides* during this protracted discovery dispute. Plaintiffs charge the USCC/NCCB with bad faith; the latter protest their good faith and respect for the court. In the court's view the USCC/NCCB have done more than simply exercise bad judgment; they have wilfully misled the court and the plaintiffs and have made a travesty of the court process.

The court assumes familiarity with the history of this case, which has already been the subject of three published opinions. *See, Abortion Rights Mobilization, Inc. v.*

Regan, 544 F. Supp. 471 (S.D.N.Y. 1982) ("*ARM I*"); 552 F. Supp. 364 (S.D.N.Y. 1982) ("*ARM II*"); and 603 F. Supp. 970 (S.D.N.Y. 1985) ("*ARM III*"). Nonetheless, a recital of that history will provide an illuminating context for the facts giving rise to the instant motion. Plaintiff individuals and organizations challenge enforcement of § 501(c)(3) of the Internal Revenue Code which provides tax exempt status to charitable and educational institutions. Plaintiffs challenge the tax-exempt status of the Roman Catholic Church. They assert that the Church's lobbying and political activities against abortion render the exemption unlawful under § 501(c)(3) of the Internal Revenue Code. They also argue that the exemption violates the First Amendment to the United States Constitution. The individual plaintiffs complain because they are unable to deduct from their income contributions that they make to organizations promoting abortion, whereas taxpayers who oppose abortion can make tax-deductible contributions to the USCC and NCCB. The organizational plaintiffs complain because they are denied tax-exempt status for advocating abortion, whereas the USCC/NCCB enjoys such status and is free to engage in anti-abortion activities.

In *ARM I*, the USCC/NCCB, originally named as defendants, were dismissed on the grounds that plaintiffs had asserted no valid claim against them. The court held, however, that the plaintiffs could proceed against the Secretary of the Treasury and the Commissioner of Internal Revenue ("the government"). In addition, the court held that some, but not all, of the plaintiffs had standing to bring this action, and that the Anti-Injunction Act, 26 U.S.C. § 7421, did not bar the suit. The government then sought certification of the latter two determinations for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and a stay of discovery. The USCC/NCCB joined in the government's certification motion and, as we noted at the

time, "somewhat surprisingly, since they are no longer parties to the litigation," joined in the motion to stay discovery as well. *ARM II*, 552 F. Supp. at 366. Both motions were denied. *Id.* at 367.

Plaintiffs served subpoenas on the USCC/NCCB as third parties in March, 1983. A motion to quash the subpoenas was made in April, 1983. Subsequently, the government moved for a stay pending decision by the United States Supreme Court in *Wright v. Regan*, subsequently decided *sub nom. Allen v. Wright*, ____ U.S. ____, 104 S.Ct. 3315 (1984). The court denied the motion because it was not as sanguine as defendants that any decision in *Wright* would alter the court's reasoning in *ARM I*. However, it suggested a schedule of discovery which would postpone the most costly discovery until the Supreme Court had spoken. Despite this ruling, the USCC/NCCB refused to produce any documents at all, and insisted that none be produced until *Wright* was decided.

After the Supreme Court decision in *Wright* the government again moved to dismiss for lack of standing. That motion was denied on March 27, 1985. *ARM III, supra*. The government, joined by the USCC/NCCB, again sought certification of an interlocutory appeal. That motion was denied on July 12, 1985, in an unpublished memorandum decision.

Plaintiffs had by this time reactivated their subpoenas addressed to the USCC/NCCB, which continued to refuse production. In June, 1985, the USCC/NCCB moved the court for a protective order.

On July 12, 1985, the very day on which the government's second § 1292 motion was denied, the USCC/NCCB performed the first act of the wasteful charade that is the subject of this opinion. On that day,

the court held a conference with the parties and the USCC/NCCB concerning the subpoenas and the outstanding motion for a protective order.

At this point it is appropriate to point out that litigants are free to opt for a citation of contempt if that is the only available avenue to obtain review of what they consider incorrect determinations by a lower court. Moreover, litigants may certainly take all steps to seek review short of contempt and resort to that step only as their last refuge. The court could not fault such behavior. If, at this July meeting, counsel had advised the court that the USCC/NCCB would continue to seek appellate review and that they had resolved to subject themselves to a contempt order should other means of appellate review fail, there would be no cause to complain today. But the USCC/NCCB did more than fail to be forthright with the court. They began to engage the court and the plaintiffs in a series of maneuvers that—given the USCC/NCCB's apparent intention of ultimate non-compliance—made a game of the judicial process.

At that July 12 meeting, the USCC/NCCB stated its concerns about infringement of their religious freedoms through enforcement of the subpoenas. In response, the court emphasized that it would not permit plaintiffs to engage in any broad-gauged incursion into the USCC/NCCB files, but would permit discovery only of matters demonstrably relevant to the issue before the court. The USCC/NCCB complained of wide publicity given to a document that the plaintiffs had previously received. The court censured that practice and barred plaintiffs from making public any discovery materials produced by the USCC/NCCB, since the court assumed that any documents obtained were sought solely for the purposes of litigation.

Sometime after that conference plaintiffs filed a motion for an order adjudging the USCC/NCCB in contempt because they still refused to comply with the subpoena. On September 4, 1985, the court, in an endorsement, spelled out which documents should be produced and which documents were shielded by the First Amendment. Some of the documents sought were already in the public realm, and there appeared to be no basis for withholding them. As to the religious freedom issue, the court found that documents listed in two paragraphs of the subpoena "are the only documents which could conceivably trench on First Amendment considerations," and held that those documents need not be produced at the time. Plaintiffs were ordered to narrow their requests as to those items, and both sides were asked to present their views as to whether required production of these items, even as more narrowly and precisely defined, would nonetheless violate the First Amendment. The court found the remainder of the materials unprotected and held that there remained no justification for refusing to abide by the court's order. The court refused to hold respondents in contempt but advised plaintiffs that if the unprotected documents were not produced, the motion could be renewed.

No documents were produced. In October, 1985, plaintiffs renewed their motion for an order of contempt. On October 25, 1985, the court held yet another conference to discuss the plaintiffs' motion and respondents' request for a protective order. The court painstakingly reviewed the matter with counsel. At that time a mandamus petition, filed by the government and joined by respondents, was pending before the Court of Appeals. The parties were ordered to agree on a stipulation of confidentiality and to agree on which documents would be subject to the confidentiality order. All other issues that counsel for respondents raised were discussed and, counsel asserted, resolved.

In an order dated November 20, 1985, the court recorded what had been accomplished at the conference, supposedly resolving all objections to compliance with the subpoenas. The motion for contempt was denied, and compliance with the subpoenas was postponed until the Second Circuit's determination of the pending mandamus petition. With the exception of matters delineated in the order or new matters that might arise by virtue of the Second Circuit determination, further objections to plaintiff's subpoenas were barred.

The Second Circuit denied the mandamus petition on January 14, 1986. The USCC/NCCB continued to defy the court order. Another motion for contempt was filed on February 6, 1986. The USCC/NCCB in opposition urged the court to wait for the outcome of a petition to the Second Circuit to rehear the case *en banc*.

On February 26, 1986, the court again denied plaintiffs' motion without prejudice and ordered compliance with the subpoenas on or before March 7, 1986, unless in the interim the Second Circuit granted the petition for rehearing. On March 3, 1986, the Second Circuit denied the petition and the March 6, 1986 letter quoted above followed.

All of this effort to protect the USCC/NCCB's acknowledged interests are now shown to have been utterly, utterly futile. Had the court been told that the USCC/NCCB intended to seek appellate review by defying any subpoena, no matter how narrowly circumscribed, it could have stayed all action on the subpoenas until other avenues to bring the matter before the Second Circuit had been ventured. In the event that those avenues failed, the contempt order would have followed. We would be exactly where we are today, less the baggage of plaintiffs' assertions of bad faith and delay and the court's conclusion that plaintiffs' complaints are amply justified.

Respondents correctly note that the Second Circuit's refusal to grant the petition for mandamus gives no indication of its views as to the merits of the underlying issues. Yet precedent is such that denial was all but a certainty. Mandamus is, after all, an extraordinary writ. The most efficacious route to a review by the Court of Appeals under the circumstances was by review of an adjudication of respondents in contempt. The government had no basis for using a contempt adjudication to get an appeal before the Second Circuit. The USCC/NCCB did.[1] Counsel *must* have foreseen that such was their most likely recourse. Hence, I agree with plaintiffs that the USCC/NCCB's vigorous activities up to now—seeking protective orders, holding conferences with the court and plaintiffs to discuss and agree on matters which could be subject to confidentiality protection—have been a complete waste of time and energy. The result has been to stall and frustrate plaintiffs' efforts for an early resolution of their right to obtain discovery. For that reason, sanctions for each day's delay are appropriate.

The respondents concede that they are in contempt and the facts are not in dispute. Moreover, the respondents, from the first motion for contempt filed on June 20, 1985 until now have been accorded plentiful opportunities to be heard. Therefore, no formal hearing is now required. *Parker Pen Co. v. Greenglass*, 206 F. Supp. 796 (S.D.N.Y. 1962) (Dawson, J.). Sanctions may be imposed.

---

[1] Apparently, what the government and USCC/NCCB would like is appellate review of the merits of this court's rulings in *ARM I* and *ARM III* prior to any trial before this court. It is questionable whether appeal of the contempt order will get the merits of the controversy before the Court of Appeals. It will, however, put in issue the validity of the subpoenas and of the court's order that the USCC/NCCB produce the requested documents.

Danielson v. United Seaworkers Smoked Fish & Cannery Union, 405 F. Supp. 396, 403 (S.D.N.Y. 1975) (Carter, J.); *MCA, Inc. v. Wilson*, 425 F. Supp. 457, 459 (S.D.N.Y. 1977) (Cooper, J.). The USCC/NCCB are adjudged in contempt for refusing to comply with the February 26, 1986 order of the court. Beginning May 12, 1986, for each day that the USCC/NCCB continues to defy the court's order, each will be subject to a fine of $50,000 per day.

IT IS SO ORDERED.

Dated: New York, New York
May 8, 1986

/s/ ROBERT L. CARTER
Robert Carter
U.S.D.J.

APPENDIX G

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 85-3056
S.D.N.Y. Carter 80 CIV 5590

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of March one thousand nine hundred and eigthy-six

---

IN RE:

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, PETITIONERS.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioners James A. Baker, III, Secretary of the Treasury and Roscoe L. Egger, Jr., CIR,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20281